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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

JOHN J. TATAR, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

John J. Tatar petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on April 12, 1971.

OPINION BELOW

The Opinion of the Court of Appeals is not yet officially reported. It is reprinted as Appendix 1, annexed hereto.

JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit was entered on March 24, 1971 (App. 1). On April 12, 1971 the Court of Appeals denied a Petition for Rehearing (App. 2). On May 12, 1971, this Court, Mr. Justice William O. Douglas, entered an order granting Petitioner an extension of time until June 11, 1971, within which to file a Petition for Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The District Court had jurisdiction under 18 U.S.C. § 3231.

QUESTIONS PRESENTED

Petitioner John J. Tatar, who had duly raised the issue of entrapment, was charged with and convicted of violating 18 U.S.C. § 201(b);[1] the Court of Appeals affirmed the conviction after acknowledging that there was a split of judicial opinions on the question of the proper test to be used for determining entrapment as well as on the question of the propriety of the form of instruction used by the District Court.[2] The questions presented in this criminal case involve the issue of entrapment, including the test to be used to determine the existence of entrapment, the propriety of instructions on the issue, the question of whether the District Court should make an independent finding on the issue before presenting it to the jury, and whether, in this

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[1] Petitioner was charged with corruptly promising to give a parcel of land to an agent of the Internal Revenue Service with the intent of inducing him to violate his duty. This was Petitioner's second trial, the first having resulted in a mistrial when the jury was deadlocked.

[2] The Slip Opinion of the Court of Appeals is attached hereto as Appendix 1.

case, there was entrapment as a matter of law. More particularly, the questions are:

1. Did the Courts below err in employing the so-called "predisposition" test under which an accused is to be found guilty if he is found, by the jury, to have had a predisposition to commit the crime (i.e. offer of a bribe), regardless of the suggestive and threatening nature of the Government's conduct leading up to the alleged bribe; and should the Courts below have instead used the "Government conduct" test under which the accused is to be found not guilty if the Government's conduct, prior to the alleged bribe, was so threatening and suggestive as to be reasonably calculated to lead an average innocent person to commit the crime (i.e. offer a bribe) regardless of the state of mind of the particular accused involved?

2. Where in this case the alleged bribe offer was not spontaneous or unsolicited and the entrapment issue was clearly raised:

A. Should the Courts below have found that Petitioner was entrapped as a matter of law, even under the erroneous "predisposition" test? and

B. Should the District Court have made its own independent legal determination, supported by findings and conclusions based on the proper test for entrapment, as to whether there was entrapment before submitting the issue to the jury, a procedure required in the analogous area involving a contest over the voluntariness of confessions?

3. In instructing the jury that it should find Petitioner guilty if he were predisposed to commit the crime, irrespective of the Government's conduct, did the District Court commit reversible error in also in-

structing the jury that there is a "lawful" form of entrapment, an instruction which the Ninth Circuit recognized as having been criticized by the Second and Tenth Circuits but which the Ninth Circuit erroneously found had not been objected to?

4. Were the District Court's instructions so permeated with coercive, prejudicial and confusing remarks as to compel a reversal of the conviction as a matter of law, in that the District Court not only gave the jury the so-called "Allen" charge (itself in disfavor) but went even further in pressing for a verdict by improperly informing the jury that the first trial had ended with a hung jury and that the case would have to be decided by some jury sometime, by extolling the virtue of the Government's case and by advising the jury that the facts were clear despite the fact that the jury had expressed not only confusion but deadlock?

STATEMENT

1. Proceedings Below

The Federal Grand Jury for the Central District of California returned an indictment against Petitioner John T. Tatar charging him with violating 18 U.S.C. § 201(b) by corruptly promising to give a parcel of land to a public official (an agent of the Internal Revenue Service) with the intent of inducing the agent to violate his duty. Petitioner was first tried on December 11 and 12, 1968, but, when the jury deadlocked, a mistrial was ordered. The second trial commenced on March 4, 1969, and on March 7, 1969, a jury found Petitioner guilty as charged. Petitioner was sentenced to the maximum prison term, fifteen years, and a study as described in 18 U.S.C. § 4208(c) was requested by the court. Petitioner appealed to the United States Court

of Appeals for the Ninth Circuit which affirmed the judgment of conviction in an Opinion entered on March 24, 1971 (App. 1). A petition for rehearing was denied on April 12, 1971 (App. 2). Petitioner was granted an extension to June 11, 1971 by Mr. Justice Douglas for the filing of this petition.

At trial, Petitioner properly raised the issue of entrapment, based upon the suggestive and threatening conduct by the revenue agent who had been investigating Petitioner's federal income tax liabilities. The tax audit had been conducted by the agent from March to June, 1968, during which time the agent and Petitioner had a series of meetings. Their discussions during a meeting on June 17, 1968 were, unbeknownst to Petitioner, recorded by an electronic device concealed in the agent's briefcase, and they were also being transmitted to a second nearby recording device manned by additional agents a short distance from the meeting place. (Tr. 49, 64, 67-68, 74, 79, 83 and 106-107).[3]

Although the only issue at trial was whether Petitioner was entrapped by the conduct of the agent, whose tactics of suggestion and threats of punitive tax consequences prior to the charged offer are also evidenced by the transcription of the said meeting between Petitioner and the agent, the District Court at no time made

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[3] The designation "Tr." refers to the transcript of the second trial. The designation "Ct. Exh." refers to the transcription of the tape recorded meeting between Petitioner and Revenue agent Miller on June 17, 1968 which was admitted at trial as a court exhibit. This transcription is reprinted as Appendix 3. Although the court exhibit also includes transcriptions of meetings between Petitioner and agent Miller on June 25, and 26, 1968 (Ct. Exh. pp. 57 et seq.), those parts of the court's exhibit have not been reprinted in Appendix 3 since the prosecution proceeded on the theory that the bribe offer was made on June 17, 1968.

an independent finding as to whether Petitioner was entrapped. During the course of the trial and during the jury's deliberations, the district court instructed the jury on four separate occasions as to the law of entrapment. The first occasion was at the very outset of the trial (Tr. 52-55); the second was at the close of the evidence (Tr. 191-193); the third was during the course of jury deliberations when the jury advised the court that it was confused and desired further instructions (Tr. 202-03); and the fourth was after the jury advised the court that it was deadlocked, at which time the court gave the "Allen" instruction over defense objection and coupled it with other highly impermissible comments, repeating the essence of the entrapment instruction it had previously rendered on three occasions, and then interjecting a new test as it read a supplemental instruction on entrapment requested by the Government, to which the defense had a standing objection (Tr. 129-31, 224-25).[4]

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[4] Reprinted as Appendix 4 is the trial transcript, pages 224-235, which includes:

(A) The receipt of the jury's note stating that an impasse had been reached (Tr. 224);

(B) Defense objections to the reading of the "Allen" charge and to the Government's proposed supplemental entrapment instruction (Tr. 224-25);

(C) The "Allen" charge with extra admonitions (Tr. 225-28);

(D) The fourth reading of the court's entrapment instruction (Tr. 229-32, which is virtually a verbatim repetition of the instruction given on three earlier occasions during the trial);

(E) The addition of the Government's supplemental instruction pertaining to "lawful" and "unlawful" entrapment (Tr. 231-32);

(F) The court's final admonition to the jury to "keep in mind the Allen instruction," and that the facts in this case were clear (Tr. 233); and

(G) The defense motion for a mistrial (Tr. 235).

Both the District Court and the Ninth Circuit used the so-called "predisposition" test, under which entrapment may not be found despite suggestive and threatening conduct by the Government, as long as the accused is found to have had a predisposition to offer a bribe. This approach rejecting the "Government conduct" test, was explicitly stated in the District Court's instructions which were given on four separate occasions as noted above. The supplemental instruction, adding a new element (i.e. lawful *versus* unlawful entrapment), and given for the first time only after the jury became deadlocked, was as follows:

> The law recognizes two kinds of entrapment, unlawful and lawful entrapment. Where a person has no previous intent to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment because the law as a matter of policy forbids a conviction in such a case.
>
> On the other hand, where a person had the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is no defense, but is lawful entrapment. (Tr. 231; App. 4, p. 49a).

After this last instruction was given, combining the "predisposition" test with a charge that some kinds of entrapment may be "lawful," several more comments and questions by the jury illustrated their continuing confusion. (Tr. 232-33; App. 4, p. 50a). The court then commented:

> More confused?
>
> Well, keep in mind the Allen instruction. This says that the case can't be tried any better. Everything that you know about this case has been given

> to you. And probably you will never have a case that has the facts more clearly set forth because of the transcript. (Tr. 233; App. 4, p. 51a).

The jury retired to deliberate, Petitioner's counsel moved for a mistrial, and the motion was denied (Tr. 233-35; App. 4, pp. 50a-52a).

In the Ninth Circuit, Petitioner argued, as he had done in the trial court, that there was entrapment as a matter of law and, further, that it was error for the court to instruct as it did. Although the Ninth Circuit recognized a difference of judicial opinion on the "predisposition" and "Government conduct tests, and acknowledged the criticism directed to the "lawful entrapment" instruction by two other Courts of Appeals, it nevertheless erroneously found that Petitioner had not raised the issue of the instruction; the Ninth Circuit disregarded the Allen charge, and, despite the error of the form and substance of the District Court's instructions, opined that Petitioner would have been found guilty even if an instruction based on the "Government conduct" test had been given. However, in attempting to justify the conviction under the "Government conduct" test, the Ninth Circuit, evidencing the confusion in this area, nevertheless lapsed back into the "predisposition" test, making that test determinative by relying upon Petitioner's "previous statements indicating a desire to offer a bribe." (App. 1, p. 5).

The Ninth Circuit not only used the wrong standard in attempting to make the very legal determination which should have been made by the District Court, but it also attempted to guess what the jury would have done if properly instructed, an impossible exercise for the Ninth Circuit in view of the confusion and dead-

lock which existed among the jurors during their deliberations.

2. Facts Relating to the Entrapment

It is undisputed that the agent, after four meetings with Petitioner, went to the fifth meeting on June 17, 1968, with the subject of a potential bribe on his mind. (Tr. 106-107.) The agent had previously discussed Petitioner's tax liability in prior meetings, including that relating to Petitioner's purchase and sale of lots of land in Nevada, and this provided the background for the recorded conversations on June 17, 1968.

The agent, during the recorded interview, repeatedly voiced grave concern as to the magnitude of Petitioner's tax problems and potential liabilities, including Petitioner's failure to file a 1967 income tax return, even though it was only June, 1968, and even though the agent's audit was limited to years prior to 1967. (Ct. Exh. pp. 10-25; App. 3, pp. 14a-25a). While the agent kept reiterating incriminating charges and predicting dire consequences, he also kept shifting discussions to the Nevada real estate which Petitioner had been, and was then in the process of, buying and selling. (Ct. Exh. pp. 12, 22-23, 25 et seq; App. 3, pp. 15a-16a, 22a-23a, 24a, *et seq*). After each such thrust, the agent then took a noncommittal position, making statements such as "what would you suggest I do?" (Ct. Exh. pp. 42, 43; App. 3, p. 35a).

The Petitioner responded to such thrusts and questions by stating that the agent should determine what was owed and that he would willingly pay any taxes found to be due once the agent concluded his audit. (Ct. Exh. pp. 13-14, 20, 23; App. 3, pp. 16a-17a, 21a, 23a). After such discussions and just prior to the time

when the Government contends a bribe offer took place, they had the following dialogue:

> Petitioner: "Well, anyway, you figure it out and I'm not going to argue with you."
> Miller: "Well, I don't want to argue either."
> Petitioner: "You figure out what you think I should do and I'll try and do it.
> Miller: "What do you mean what I think I should do? or you should do?"
> Petitioner: "Whatever you think I should do with this here, with the income tax. You figure out what you think is right for both sides and I'll just pay whatever I have to pay." (Ct. Exh. p. 42; App. 3, p. 35a).

Immediately thereafter agent Miller asked a series of baited questions such as "what would you suggest I do, I mean if I didn't—," followed by "how would you want me to do it?" and "well, I just wanted to hear how you wanted me to do it." (Ct. Exh. pp. 42-43; App. 3, p. 35a). Thereafter the charged bribe offer began to take shape, wherein the Government contends that Petitioner offered the agent some land in Nevada with an improper motive.

The evidence uncontrovertibly showed that Petitioner, even after contacts with the agent over three months and after the above noted discussions on June 17th, was still suggesting that the agent complete his audit and determine what was due, which amount Petitioner would pay. Since the alleged bribe took place only after such discussions and after the agent purposefully did not accept the lawful solution suggested by Petitioner, it was incumbent upon the Government to prove a predisposition on the part of Petitioner to offer a bribe, despite the fact that he offered to pay

what was due. Since the discussions during the first eighty percent of the June 17th meeting were diametrically opposed to any predisposition by Petitioner to offer a bribe, at trial the agent testified to a conversation he had with Petitioner on June 11, 1968 wherein the agent thought that an alleged predisposition was shown. (Tr. 80-81).

The agent testified that, on June 11th, Petitioner asked the agent if the agent would like Petitioner to get a lot of land for the agent for a cost of $250.00 (the cost Petitioner had been incurring for such lots). When the agent said that $250.00 was a lot of money, Petitioner said "Don't worry about it, just give me your name and address and I will take care of the rest." (Tr. 82). This June 11th conversation was not recorded; it was merely testified to as such by the agent. Nor does the Government contend that this conversation constituted an attempted bribe, but only that it showed a predisposition to commit such a crime. However, on June 17th, as noted above, Petitioner's position was anything but one of offering a bribe, and the alleged bribe did not occur until the agent repeatedly intimidated Petitioner and refused to pick up Petitioner's suggestion that the agent determine what tax was due, which amount would be paid; and only after the agent's leading questions such as "What would you suggest I do, I mean if I didn't—"(Ct. Exh. p. 42; App. 3, p. 35a), did the alleged offer take place. In view of this, the ambiguous conversation of June 11th is a slender reed at best on the question of predisposition, and yet it was upon an inference from that June 11th conversation that the Ninth Circuit relied in upholding the conviction despite the acknowledged infirmities in the instructions combined with the potentially preju-

dicial effect of an embroidered Allen charge on a deadlocked jury. It is Petitioner's contention that, as a matter of law, entrapment was shown consistent with this Court's decision in *Sherman* v. *United States*, 356 U.S. 368 (1958), that predisposition was not shown, and that, in any event, the jury was not properly instructed so as to assure a proper verdict.

REASONS FOR GRANTING THE WRIT

There are three independent reasons why a Writ should be granted: *First*, there is a need for a clarification and a resolution by this Court of the confusion which exists among opinions on the definition of entrapment and the manner in which the doctrine should be explained to juries. *Secondly*, there is, in this case, the question of whether the trial court so far departed from accepted and usual judicial proceedings in its manner of instructing the jury after it became deadlocked, both on the question of additional entrapment instructions and on the question of coercing the deadlocked jury into reaching a verdict, as to call for an exercise of this Court's power of supervision to assure a fair trial and due process of law. *Thirdly*, there is an important question relating to the administration of federal criminal law which has not been passed upon by this Court, whether federal trial courts should, in criminal cases involving a clear issue of entrapment, conduct an independent proceeding without a jury (as in confession cases) to determine whether Government conduct relevant to the issue of entrapment has gone beyond the pale of acceptable law enforcement, thereby requiring a dismissal of the criminal prosecution. Each of these points is hereinafter discussed.

1. Clarification of the Law of Entrapment.

Although this Court has spoken on the issue of entrapment in 1958 [*Sherman* v. *United States* and *Masciale* v. *United States,* 356 U.S. 368, 386] and in 1963 [*Lopez* v. *United States,* 373 U.S. 427], there are still not only open questions but there is a conflict among judicial opinions as the Ninth Circuit in this case acknowledged. In view of the real danger of expertly subtle suggestion, persuasion and threat, of which law enforcement officials may be capable, it is vitally important to determine which of the two tests is to control: to determine the question of entrapment, is a court and jury to probe the mind of an accused (who may not testify, as in this case) to determine an illusory or at least highly subjective state of mind, namely "predisposition"; or is the jury objectively to evaluate the Government's conduct to determine whether it could have led an average innocent person into committing a crime he would otherwise not have committed?

The objective standard of evaluating the Government's conduct is not only easier and more subject to evaluation and review, but is more in keeping with analogous areas of the law (such as the voluntariness of confessions and search and seizure) where the Government conduct is the predominant or determinative yardstick. It is a paradox to inquire into the highly subjective and difficult area of "predisposition" while seemingly ignoring Government conduct which is oppressive or overbearing on its face.

From *Sorrells* v. *United States,* 287 U.S. 435 (1932), to *Lopez, supra,* the language of this Court has focused on whether or not an alleged offense was the product of

threatening and suggestive activity of law enforcement officials. Nevertheless, in this case, the courts below have distorted this concern by focusing on whether the accused was predisposed to commit the crime charged, irrespective of the creative activity of Government agents. (Seen Ninth Circuit opinion below, Appendix 1, pp. 4a-5a). It is submitted that this Court has defined a doctrine of entrapment out of concern over Government conduct, with possible predisposition by an accused as purely a subsidiary consideration. If that is so, the jury instructions used below abandoned this concern, at four junctures in the trial, when the court in effect told the jury that if they found a predisposition on the part of Petitioner they need not even consider the activities of the Government's agent. There is a need, therefore, not only to resolve differences of view but also to assure consistency with the principles enunciated by this Court.

In addition to resolving which test is the proper one, it should also be determined whether entrapment is to be deemed, and expressed to the jury as, a defense. In the trial in this case the District Court referred to entrapment as a "defense" on more than twenty occasions, and it is difficult to see how a jury could keep from being confused by the coupling of such repeated descriptions with the court's instruction that the Government had the burden of proof. To refer to entrapment as a defense can only detract from the heavy burden of proof on the Government, and to avoid such detraction and resulting confusion, the term "defense" should be eliminated in the description of the concept of entrapment.

Moreover, the difference of opinion among circuits on the propriety of instructing the jury as to "lawful en-

trapment" begs for resolution. *United States* v. *Pugliese,* 346 F.2d 861 (2nd Cir. 1965); *Garcia* v. *United States,* 373 F.2d 806 (10th Cir. 1967); and *Martinez* v. *United States,* 373 F.2d 810 (10th Cir. 1967). Not only must this conflict be resolved, but this is an appropriate case for such resolution. Notwithstanding the Ninth Circuit's assumption that no objection was made to this charge when the jury became deadlocked, the instruction was given over Petitioner's objection (Tr. 224; App. 4, p. 45a. See also Tr. 129-131). Moreover, this case not only combines errors regarding the concept of entrapment with errors in instructions, but does so in the context of a case tainted by the giving of a magnified "Allen" charge.

2. The Totality of the Court's Instructions, Including the "Allen" Charge With Additional Impermissible Comments, So Coerced the Jury as To Require an Exercise of This Court's Supervisory Power in Reversing the Conviction.

Petitioner was convicted at his second trial. The first trial ended with a hung jury. The second trial appeared to be ending in the same fashion when the trial court intervened and by wholly impermissible and coercive handling of the jury, produced a verdict.

When the jury in this case reported its inability to reach a verdict after less than five hours of deliberation (Tr. 200-201, 219-220, 224), the District Court, *sua sponte,* gave the jury the so-called "Allen" charge, including the admonition, to the minority jurors only, that they should reexamine their position. (Tr. 226-227; App. 4, pp. 46a-47a).[5] The District Court's remarks went even beyond the acknowledged coercive effect of the Allen charge when it instructed the jury

[5] *Allen* v. *United States,* 164 U.S. 492 (1896).

that it "should consider that the case at some time must be decided, some time it has to be decided" (Tr. 226; App. 4, p. 46a) and further that:

> This is the second time that this case has been tried. There was a trial a month ago and the jury was hung up. And this is the second time. (Tr. 225; App. 4, p. 45a).

The coercive effect of such language on an admittedly confused and deadlocked jury was accentuated by the court's further instructions when, on the heels of the foregoing, it repeated the entrapment instructions previously given and, for the first time (at the Government's request made earlier), gave a new and additional instruction that there may be "lawful" as well as "unlawful" entrapment (the formulation criticized by two Circuits). This obviously created even more confusion since the jury, after such instruction, asked several questions and the court responded (Tr. 232-33; App. 4, pp. 50a-51a):

> More confused?
>
> Well, keep in mind the Allen instruction. This says that the case can't be tried any better. Everything that you know about this case has been given to you. And probably you will never have another case that has the facts more clearly set forth because of the transcript.

Not only was this last comment even more confusing, but it was legally prejudicial since only the Government had presented evidence and such remarks tended to give the Government's case an aura of clarity and persuasiveness which had obviously not been the jury's impression. As noted, Petitioner objected and his motion for a mistrial was denied.

The District Court not only used the "Allen" charge in its most virulent form, a use proscribed in several circuits and states,[6] but it went far beyond the *Allen* formulation and had an obviously coercive and prejudicial effect which was totally unwarranted on the basis of the evidence presented. On the basis of well established authority, such remarks constitute reversible error.[7]

While this Court's decision in *Jenkins* v. *United States*, 380 U.S. 445 (1964), requires reversal because the trial court's comments in this case went far beyond the "Allen" charge, this case is also an appropriate vehicle for determining whether the basic "Allen"

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[6] See *United States* v. *Fiorvaventi*, 412 F. 2d 407 (3rd Cir. 1969), *cert. den. sub nom. Panaccione* v. *United States*, 396 U.S. 837 (1969); *United States* v. *Wynn*, 415 F. 2d 135, 137 (10th Cir. 1969); *State* v. *Thomas*, 86 Ariz. 161, 342 P. 2d 147 (1959); *State* v. *Randall*, 137 Mont. 534, 353 P. 2d 1054 (1960); *Commonwealth* v. *Spencer*, 9 Cr. L. Rptr. 2075 (Pa. March, 1971); *Thomas* v. *United States*, 8 Cr. L. Rptr. 2141 (D. C. Cir. Nov. 6, 1970), *vacated for In Banc consideration* (January, 1971). See also *ABA Standards Relating to Trial by Jury* (Approved 1968), Section 5.4.

[7] *Jenkins* v. *United States*, 380 U.S. 445 (1964) ("You have got to reach a decision in this case."), *rev'g* 330 F. 2d 220 (D.C. Cir. 1964); *Williams* v. *United States*, 338 F. 2d 530, 532 (D. C. Cir. 1964); *United States* v. *Rogers*, 289 F. 2d 433, 435 (4th Cir. 1961); *Powell* v. *United States*, 297 F. 2d 318 (5th Cir. 1961); *United States* v. *Harris*, 391 F. 2d 348, 355 (6th Cir. 1968) (second trial; "This law suit must be decided—it must be decided at some time by some jury."); *United States* v. *Tolbert*, 406 F. 2d 81, 86 (7th Cir. 1969) and the dissenting opinion in *United States* v. *White*, 382 F. 2d 415, 450 (7th Cir. 1967) ("The statement is untrue" that the case must be decided sometime by some jury.); *Kawakita* v. *United States*, 190 F. 2d 506, 528 (9th Cir. 1951), *aff'd*, 343 U.S. 717 (1952) (The "Allen" charge question was not raised in the Supreme Court; see arguments of counsel at 96 L. Ed. 1253-54) and see also *Sullivan* v. *United States*, 414 F. 2d 714, 716 (9th Cir. 1969).

charge itself is such an invalid and coercive intrusion into proper jury deliberations as to be deemed erroneous as a matter of law.

3. This Court Should Require a Hearing and Decision by Trial Courts Without a Jury on the Issue of Entrapment.

In 1958, in *Sherman* v. *United States, supra,* a majority of five justices of this Court reversed a conviction without reaching the minority view (reflected in the concurring opinion of Mr. Justice Frankfurter joined by Justices Douglas, Harlan and Brennan) that entrapment should be decided by trial courts in the first instance because the doctrine of entrapment is based on a concern that the Government obtain convictions by lawful means. As stated by Justice Frankfurter, the Government may not abuse and direct its power "to bring about the downfall of those who, left to themselves, might well have obeyed the law." The doctrine is concerned with "blocking off areas of impermissible police conduct," and it is therefore "appropriate for the court and not the jury" to decide issues of entrapment fairly raised. 356 U.S. 378 at 384-85.

Six years later, although in the context of coerced confessions, these identical considerations were embraced by this Court. *Jackson* v. *Denno,* 378 U.S. 368 (1964). In *Jackson,* this Court determined that the voluntariness of confessions must be determined by a trial judge in the first instance, and only if the trial court finds that a confession was voluntary, would it be submitted to the jury for an independent finding.

In the *Sherman* case, the Court's majority equated entrapment with coerced confessions in the context of impermissible Governmental activity. Quoting from *Sorrells, supra,* 287 U.S. at 442, the Court in *Sherman*

noted that the detection of criminal activity may require stealth and strategy by the police. The Court noted, however, that:

> a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute . . . *Then stealth and strategy become as objectionable police methods as the coerced confession* and the unlawful search. 356 U.S. at 372 (emphasis added).

It is ironic that in 1958 this Court equated entrapment with coerced confessions, and in 1964 prescribed a specific procedure for trial court determinations of the legality of Government conduct in obtaining confessions—a procedure suggested earlier in the concurring opinion in *Sherman* with regard to entrapment—but as yet the analogous issue of entrapment has been denied equivalent judicial consideration.

In reaffirming the need for independent judicial review, a principle which is common to the areas of coerced confessions and entrapment, this Court should require that the same judicial attention and comparable procedures be devoted to cases involving entrapment as are devoted to cases involving confessions. As previously stated in opinions in this Court:

> It is the province of the court and the court alone to protect itself and the government from such prostitution of the criminal law. *Sorrells,* 287 U.S. at 457 (separate opinion by Mr. Justice Roberts).
>
> Equally important is the consideration that a jury verdict, although it may settle the issue of entrapment in the particular case, cannot give significant

> guidance for official conduct in the future. Only the court, through the gradual evolution of of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of criminal justice demands. *Sherman,* 356 U.S. at 385 (concurring opinion of Mr. Justice Frankfurter).

The error of the Ninth Circuit's attempt in this case to make a legal determination on entrapement, as well as the futility of its attempt to opine what the jury may have done if instructed differently, illustrate the practical and real need for an initial decision by the District Court which would also have had the opportunity of hearing Petitioner's testimony outside the presence of the jury, and whose decision would provide a meaningful basis for appellate review.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 11, 1971

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 26,080

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOHN H. TATAR, *Defendant-Appellant.*

[March 24, 1971]

Appeal from the United States District Court
for the Central District of California.

Before: BARNES, KOELSCH, and HUFSTEDLER, Circuit Judges.

PER CURIAM:

John J. Tatar appeals from his conviction for violating 18 U.S.C. § 201(b) by corruptly promising to give a parcel of land to a public official (an officer of the Internal Revenue Service) with the intent of inducing him to violate his duty. Our jurisdiction is based on 28 U.S.C. § 1291.

The appellant admitted, through his counsel [R.T., p. 49] that he offered the bribe as charged, but based his defense on the doctrine of entrapment. In his appeal, Tatar contends that (1) the evidence established entrapment as a matter of law, and (2) that the instructions of the trial court on the issue of entrapment were erroneous and constitute grounds for reversal. Because the factual background of the case is quite long and detailed and we perceive little merit in the appellant's contentions, we will abbreviate somewhat the chain of events leading to the offer and alleged entrapment.

In March of 1968, Agent Miller of the Internal Revenue Service began an audit of appellant's tax returns for the

period 1963 to 1966 which were filed in August of 1967. Tatar was a dealer in real estate. Agent Miller soon uncovered several questionable land and loan transactions. It seems fair to characterize the initial meetings between appellant and Agent Miller by stating that Tater's records were disorganized, many were missing, his memory was sketchy, and his account of his transactions changed constantly under Miller's probing. On several occasions, Miller discovered assets and transactions which the appellant claimed to have forgotten. It soon became evident that Tatar's taxable income was in all likelihood significantly greater than he had reported for the relevant period.

On the morning of June 11, 1968, Miller again returned to appellant's house. According to Miller's testimony, the first thing Tatar said to him was, "How would you like some land in Las Vegas?" Miller shrugged and defendant went on to say, "Well, before you go today I want to talk to you about it."

Later that some morning, Miller and appellant had further discussions regarding the land. Miller testified about their conversation as follows:

> "A. He [Tatar] said I sold—He is speaking of his property close to Las Vegas—I sold one lot for $3,000.00 and another one for $7,100.00. I just put up another lot for, as security for a $30,000.00 loan.
>
> "Q. All right. Did he tell you how much he paid for that lot?
>
> "A. Yes. He told me he paid $250.00 an acre—well, $250.00 a lot and he had sixteen lots.
>
> "Q. Was there any further conversation?
>
> "A. Yes. He said, I am going up to Las Vegas tomorrow, how would you like for me to get one for you. And he said, it is only $250.00. I said, well, $250.00 is a lot of money. He said, well, don't worry about it, just give me your name and address and I will take care of the rest." [R.T. 81].

Defendant wanted an immediate response from Miller regarding his offer but agreed to wait until Monday. Agent Miller thereupon reported to his supervisor what had transpired.

Agent Miller returned to defendant's home on June 17th, 1968, this time equipped with a hidden microphone, transmitter and tape recorder. A recording was made of their conversation which lasted approximately two hours. Miller met with defendant on June 25 and 26, both of which meetings were also recorded and transcribed. Under cross-examination, Miller stated that he had related the conversation with defendant to his superior because the offer of land was unusual and surprised him and because it came from a man who didn't file tax returns for four years and had told him conflicting stories on every occasion they met. Miller stated that he had the matter of the bribe in mind while he was conducting the audit, but he didn't go to defendant's "house on the 17th expecting to be bribed". [R.T. 107]

The transcript of the recording reveals a fairly consistent pattern. Miller would bring up a transaction and Tatar would claim either that it did not constitute taxable income or that he could not remember the details. Often, he said he would look up business records and other papers but in some instances he claimed that he had none to substantiate his version of various transactions. After going over several transactions, Miller indicated that Tatar would probably be liable for substantial back taxes and penalties. Tatar responded several times that if he owed the money he would pay it. Miller replied that he was not sure what he had and once complained that every time he talked to appellant, he found something new.

Several times during the discussion, Tatar made statements which can be characterized as ambiguous. They can either be interpreted as assertions by Tatar of his intent to pay what he owed or as preliminary probings as

to Agent Miller's response to a bribe offer.[1] There then ensued the part of the conversation on June 17th in which the oral offer of the bribe was made and discussed.[2]

Entrapment as a Matter of Law.

After a thorough review of the recorded transcript and the testimony, we do not find entrapment as a matter of law under either of the two theories of the doctrine. This Circuit has followed the "predisposition theory" endorsed by Chief Justice Warren in *Sherman, supra*, at 371:

> "However, it is appellant's position here that there was proscribed entrapment as a matter of law; which is to say that the jury could not with reason find otherwise than that appellant was not a person predisposed to commit the crimes of which he stands convicted, but was an otherwise innocent person seduced by Government agents so to do."
>
> *Robison* v. *United States*, 379 F.2d 338, 343 (9th Cir. 1967) *vacated and remanded on other grounds* 390 U.S. 198.

In the case at bar there was substantial evidence upon which the jury could base its finding that beyond a reasonable doubt Tatar was predisposed to offer a bribe to Agent Miller. First, the jury could rationally infer that the June 11th offer of the land in Las Vegas was the initial approach in a bribe attempt. Once Tatar showed an intent to deflect Agent Miller from his duty, the government can properly afford him an opportunity to complete the bribe. Even if the appellant's explanation that the offer was a *bona fide* attempt of a real estate dealer to sell his property

---

[1] Court Exhibit 1, p. 23, lines 8-15; Ct. Ex. 1, p. 42, lines 10-27, p. 43 lines 1-15; Ct. Ex. 1, p. 44, lines 9-22;

[2] Ct. Ex. 1, p. 45, lines 11-18, p. 50, lines 10-21, p. 51, lines 25-27; p. 52, lines 1-8.

were a reasonable explanation, the jury would be justified in rejecting it. Buttressing the jury's inference of predisposition are the appellant's ambiguous statements related earlier. In light of the June 11th offer, the jury could rationally view these statements as further efforts by Tatar to ascertain if Miller were amenable to a bribe.

Even if the "government conduct" theory of entrapment which has been endorsed by a strong minority were applied, the appellant's contention would still fail. This view of the doctrine was advanced by Justice Frankfurter in *Sherman,* 356 U.S. 369 (1958) (concurring opinion), by Justice Traynor in *People* v. *Moran,* 1 Cal. 3d 755 (1970) (dissenting opinion), and by a District Court in this Circuit recently in *United States* v. *Chisum,* 312 F. Supp. 1307 (C.D. Calif. 1970). In *Moran, supra* at 765 the dissent stated the test as follows: "The line must be drawn between methods likely to persuade those unwilling to commit an offense from methods likely to persuade only those who are ready to do so."

Lopez v. *United States,* 373 U.S. 427 (1963), is a case factually similar in many respects to the one before us. An Internal Revenue agent was given electronic recording devices after he reported a bribe attempt to his superiors. The agent thereby recorded additional bribe offers. The Supreme Court found this practice to be justified under the circumstances. In Lopez, however, the agent made no leading remarks in order to elicit the bribe. Our review of the statements of Agent Miller to Tatar reveal the use of no methods of persuasion or inducement which would lead an innocent person to commit this crime. Although Miller made several remarks from which one could infer that he was leading Tatar on, we do not find that these remarks constitute untoward or excessive inducements in view of Tatar's previous statements indicating a desire to offer a bribe.

Entrapment Instruction.

Appellant next contends that in its instructions, the trial court distinguished several times between "lawful" and "unlawful entrapment" and thereby confused the jury. Because the appellant's counsel at trial did not object to the instructions, we may reverse only if the trial court committed "plain error" in making this distinction. Rule 52(b) F.R. Crim. P.

In recent years, the Second (*United States* v. *Pugliese*, 346 F.2d 861 (1965) and Tenth (*Garcia* v. *United States*, 373 F.2d 806 (1967) and *Martinez* v. *United States*, 373 F.2d 810 (1967) Circuits have criticized the use of this distinction but neither has found that its use constituted plain error. In fact, such a view was expressly rejected in *Martinez, supra*, at 812-13.

In our own Circuit, the use of these terms was approved in *Robison, supra* at 346.

Our review of the instructions given by the trial court shows them to have stated the law properly, and to have correctly placed the burden of proof upon the government.

The judgment is *Affirmed.*

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 26,080

UNITED STATES OF AMERICA, *Appellee,*

v.

JOHN H. TATAR, *Appellant.*

[FILED April 12, 1971]

Order

Before: BARNES, KOELSCH and HUFSTEDLER.

Appellant's Petition for Rehearing is denied.

APPENDIX 3

Court Ex. 1

[1] **First of a Monitored Recording Between John Tatar and Revenue Agent Richard A Miller at Tatar's Residence (2828 Sunset Hill Drive, West Covina, California) on June 17, 1968, at Approximately 10:00 A.M.**

Present:

JOHN TATAR
RICHARD A. MILLER, Revenue Agent

Transcribed by: GLORIA SENITT

Date: December 3, 1968

(The aforementioned individuals will hereinafter be referred to as follows: JOHN TATAR will be signified by the initial T—REVENUE AGENT RICHARD A. MILLER will be signified by the initial M.)

* * * * * * * * * *

M: How are you? T: Good. The car went kapooey and I had to get another one. I'll go get the papers.

M: Okay. T: Here's one of the notes she signed.

M: Who's that note from? T: Rosemary Applegate. That's the piece of property that's still in litigation.

M: Now, how much money did you get from her—this is for 12,000? T: Yah.

M: That was back in '61. I thought you were getting money— T: —Well, this is for—

M: You don't know how much money that is? T: I don't.

M: Didn't you keep track of it? T: She kept track of it.

M: How much did she pay? Was it the estate or her husband or what? T: The estate.

[2] M: The estate? T: Yah.

M: Is that the one you told me—I thought they dropped that? I thought they just sent you a letter? T: Yah, they did. I can show you I borrowed the money.

M: Yah, but you don't know how much? You sure you couldn't find any more bank statements, ha? Delt Investment—you know over there in Glendale? T: Yah.

M: I don't know how much income is coming in . . . look at this one? There's a thousand dollars right there. T: I closed it right after that.

M: Where did the money come from? T: I can't think now.

M: Did you have any deals in '63 other than the Crenshaw Pico business? T: No.

M: How much money did you make on that? T: Say about four or five thousand.

M: Well, 5400? You see I don't know you have these others. They're not right and in 1965 the receipts reported were incorrect and the cost is incorrect and I have no idea and that's the problem, all these things. Well, we'll go over what we got here. '63 we have $5400 for gross receipts. Did you borrow money during '63? T: That was '63?

M: Yah, that was '63. The thing is—the moneys got to be coming from somewhere. We have $5400 here in receipts and expenditures [3] are roughly over five thousand, so you know that it's got to be somewhere. Where is it? T: Where did the money come from?

M: Yah, right. T: Well, I borrowed some from Gus. I don't know how much; that's my brother. And I borrowed in '63.

M: In '64 you had this business with Bertha Himes in Riverside? T: Yah.

M: So the only thing we got on hand's that little piece of paper? It doesn't mention anything about what the note's being given for. We have a few payments of money to her. We don't know what that's for either? T: That's for . . . . on the property.

M: Well, okay, maybe about $2000. Now what stage in litigation is that in now? That was in— T: —I owe 40,000.

M: What happened to . . . . How much did you pay her? According to this it doesn't look more than a few thousand.

You know for what you received? T: I have, there's some place in here a piece of paper saying how much money I give her.

M: Now, how do we know that statement applies to— T: —Well—

M: All kinds of records return three parcels of property, $35,000. How did you get this $35,000? T: Well, that's how much money I paid for them.

M: Well, that's what you figured it in. Well, you forgot to reduce [4] the 90 some odd thousand. T: That's why they say I only owe them 40,000.

M: We don't have any— See the problem is we don't have any real verification of how much money went for other then what I have there. So, we have to be realistic about this thing. How much is it worth? Is there any real intent to repay? T: I have to pay it.

M: Well, you have to pay it? 1968—well, that's four years ago and you haven't paid anything since then, since '64 have you? T: I think—The first of '65 I gave her $1200.

M: Well, even the first of '65, 1200. That's over three years ago. T: I just haven't had any money.

M: Well, you made that deal with Fannie Fox? T: Yah.

M: Borrow any money during this time? Well, you never paid anything back. You see the point is very simply—is that it doesn't appear to me that there's any intention to repay. T: But there's a debt.

M: Well, look this piece of paper. T: Well, I have to pay it back regardless.

M: Well, that's what you say, but let's be realistic. We have a note here. Fine it's here somewhere? T: We're looking for it.

M: You can find the paper. You know what it looks like? T: Yah.

M: Here it is. I owe Bertha H. Himes the sum of $93,500 at $500 each and every month until paid in full beginning April 15, 1964. [5] First of all it was done after April 15th and it is dated April 25th, three signatures down here. Bertha H. Himes. You know, what have I got here?

Nothing. I got a piece of paper I could write it down here. We got to have something definite. It doesn't even say what it's for—a piece of land or anything. T: Well, that's what it's for.

M: And then we have this list of payment. We don't know what that's for either. How do you apply that to the note; for example, medical payments— T: Well—

M: You see a lot of things. Where did the washer go? I don't mean the washer I mean the refrigerator and sofa; in Malibu? T: In Malibu.

M: What did she have at Malibu? T: She had a home over there.

M: Did she? What happened to that one? T: Well, I think the State took it over and sold it—took the money.

M: Did you know—do you know if she's still alive? T: Yah, she's still alive. She's committed though. I don't think she's committed for arrest or something like that. I don't know what it could be.

M: When's the last time you seen her? T: Up to a few years and then I didn't know where she was.

M: How come? T: She had one—one just like it.

M: See, there again we got notes floating again. You see the problem you got here is you say you paid $1200 in 1965 and for the last [6] three years you've had money coming in and we don't know exactly how much except for a few copies of the money orders. I have several records in my mind. There wasn't any intent to repay the note. T: Oh, I have to repay the note.

M: Well, let's quit kidding ourselves. You haven't paid anything since early '65. T: Well, I didn't make any money and the God damn money I did have I had to keep myself going. Never enough money in there to take care of all that.

M: You had that 50 some odd thousand from the sale? The sale on the property when you sold it? T: Yah.

M: And then we go into '66—we have that Fannie Fox deal and we have problems right off the bat with that. You got this note that says you paid her $10,000 and she says

under Statement of Perjury that in a deposition that you only paid her $1,000. T: She's lying.

M: Well, I just want to let you know. T: Well: I know that's her handwriting and everything else.

M: Well, and then we have this telegram which is dated three days later. T: She wanted another $10,000 and I couldn't give it to her.

M: Can you prove that she paid it? Other than this note. T: That's the only way I can show it.

M: Where did you get the money for that? Did the other one clear escrow all right? [7] T: Let me think a minute here. I gave her an additional $1,000.

M: Where did it come from? T: Fischer.

M: Fischer? T: $10,000, the attorney.

M: He wrote you $10,000? What did you give him? T: Well, I gave him the money back.

M: Well, well, when did you pay it back? When did you pay Fischer back? T: In escrow.

M: But you never did have to pay—well, this was the sale of that nine and a half acres. Other than just receipts that you have, it's the only thing you show. T: She didn't want to report it.

M: She did not want to report it? T: She did not want to report. I can't help what she wanted to do. I had a receipt for the money.

M: Why didn't she want to report it? T: I don't know.

M: You have to overcome that deposition that she took. See that's a pretty strong thing—you know—that deposition taken under— T: I can tell you there's a lot of lies in there. You can see that yourself.

M: I don't know. I just hear what's going on and then in '66, let's see. T: I didn't make any money that year.

M: You just told me the last time we met that you sold a lot over [8] in Las Vegas for $7,100? T: Yah, but that's not money.

M: That's 7,000. T: But that's no money, that's no money at all.

M: What do you mean money? T: Well, when you pay your bills and have something extra.

M: How many other sales did you make? T: Where?

M: Over in Las Vegas. T: Which one?

M: Why didn't you sell the rest? T: I'm trying.

M: Last time we were talking about you had a corporation over there. T: Yah.

M: What's the name of the corporation? T: Pioneer Land Investment. I haven't got it. Its—I sold it a long time ago.

M: How long ago? I know you spend a lot of time over there. What are you doing over there? I see all these phone bills and I saw, for example, here we have a telegram. Did you ever have any transactions with her? T: None.

M: How much money did you borrow from her? T: I don't remember.

M: Is it back in '64? It's a big year. What do you do over there? Now I saw a Post Office address over there and you were down in San Diego on one of these receipts. [9] T: I lived there for about 15 years. I keep a box—I paid it last week.

M: What do you do there? I know you said you won something like twelve thousand dollars. T: Eleven thousand dollars.

M: That was in 66. That was the only time you gambled over there other than just— T: —I gambled over there? I gambled about thirty dollars.

M: Did you win? T: I can't afford to gamble. I just ain't got the money to do it.

M: Well, the thing that bothers me is—look at the payments on the house are something like two hundred and what? thirty or forty dollars? T: Right, now it's $236.

M: What about the period we're interested in? T: $1300 in taxes?

M: $1300 in taxes. So you only sold that one lot over there. What do you do with your time over there? T: Fool around.

M: You have an apartment over there? T: No, house? No.

M: Where do you stay? T: Motel.

M: See, this all takes a lot of money. T: Well, not too much.

M: How much do you suppose it takes? T: Well, last week it took—I spent about $50 and I gambled thirty. [10] I had another guy go with me and he chipped in on the gas.

M: Who's car? You're telling me— T: —My brother's car.

M: This one? What did you do with the other one? The white one that you were driving? T: That's the one. This one here is a loaner.

M: What happened to your car—I mean the one you were using? T: The guy said it was a rod. I don't know if it was a rod or not. I'm going to go and check on it.

M: See the thing is, we haven't had any filing of returns. Four years and you haven't filed for '67. T: No.

M: And you had income on that one deal. You sold the seventy-one hundred dollar lot and that cost you $250. See this is getting pretty serious business. Especially after these were solicited and you knew about it. In '67 you don't file? T: Well, I'm going to file.

M: You see the thing is the law is pretty strict and the thing is when it's continually flaunted. Because I've seen letters in here from your attorney telling you to be sure and file your tax returns and none were ever filed until we went out and got them. And you see, the thing that really tops it off is that your wife went out and filed on her own and so there. T: She's my ex.

M: You're not married? T: No.

M: When were you divorced? [11] T: Two years ago.

M: You filed joint returns again for '66, '67—that means you were married. T: Just '66.

M: Well, all these returns were signed in August '67, not— T: —I understand that, but I asked the man that made these out for us and I said should we file for both and

he said did she make them out and I said, "No." Well, he said then you should file them for both together.

M: You see what the picture is? The problem is we got delinquent returns and the numbers on them are guesses; you know that? You have unreported income in '66, the gambling winnings. The question on that Riverside deal and then you haven't even filed for '67. T: I'll file that in the next three or four days.

M: I'll have to pick it up anyway. T: Do you want to help me with it?

M: I can't do it for you. T: I'll have the man that did these do it.

M: Well, I don't know. I'm just saying this, you see the problem is we have no—these returns aren't being filed, they weren't filed until we went out and got them and the figures on them are certainly questionable and we have unreported income here. We haven't even talked about the notes. The other notes like Rosemary Applegate and so forth and so on and all these other people. You see, I don't even know how much was paid and I don't know if there is any intent to repay anyway and so [12] consequently there's a fair amount of money involved here and it's all compounded by the fact that they weren't filed; and then the fact that you haven't filed your '67 even though you say you're going to. The point is, April 15th is long gone, that's when they were due. You didn't get any extension to file so it's a pretty serious matter. T: Yeah.

M: See, I don't know how many transactions you had in Las Vegas. You told me one and in our earlier conversations you told me you didn't own any property. T: I don't.

M: Well, you told me you had sixteen lots. T: Well, there I don't own them. I don't own them.

M: Who owns them? T: Different people.

M: You see I don't know what I can believe anymore. You understand my position—it's hard for me to believe things because first of all, like you told me you didn't own property over there and then you did and I say you don't and you didn't have any transactions over there, didn't

have any income in '67 and then you tell me you do. What am I to believe? You see all this is compounded by failure to file returns for four years and the attorney let you know that you should file and the fact that you signed them as husband and wife when these were solicited— T: —Do you think that's bad?

M: Yes, if you sign them and you're not married, and then you haven't filed your '67 return. You see, not only do we have the [13] regular income tax law on this, but we're going to have negligence penalty, delinquent filing penalty—right there it's 30 per cent in penalties. You know, whatever tax add at least 30 per cent plus interest. See that's why I say it's a serious matter and that's why, for example, look at this, take everything into play: delinquent returns, telling me one thing and then changing it three or four times, failing to file in '67. You know what these papers is worth in my mind, just exactly what it's written on. T: Listen, I'm not trying to hurt the government. I'm not trying to gyp the government at all. I mean—I'm not trying to and I haven't. Now the money that I made.

M: Well, why didn't you report or file any returns for five years? In effect you didn't file other than these—you haven't filed for five years in effect. T: Yeah.

M: For five years. One's bad enough. But the continual lying, five in a row, that's not good. T: I'm not going to say that I'm ignorant to the fact to that, but I . . . . Well, what do you want me to do?

M: I don't know. T: What would you suggest for me to do?

M: What do you mean? T: I mean to get everything straightened out to a point where everybody is happy.

M: Well, let's just go over this. T: Whatever you say for me to do, I'll do it. If it's humanly [14] possible. I can't be anymore fairer than that. If I owe you money, I'll just have to earn it and pay it to you.

M: Well, let's look at '64 that's a big year alone. You reported $62,000 in receipts and once again we have this—we have— T: —That was fifty-two thousand, wasn't it?

M: Yeah. Fifty-two, that's what I said. T: I thought you said sixty-two.

M: No, fifty-two. T: Well, we'll put that whole figure in as income.

M: Well— T: —I paid some of it off—I don't care.

M: Yeah. Well, I know so— T: —Well—

M: —See; knowing that you paid it and proving it are two different things. Let's be realistic—you can sit here all day and say that you paid it—unless we have some proof of it, forget it. Let's get down and be serious. Let's see now, let's go back here—oh yeah, another thing that comes into my mind—all these things are handled through your sons' and daughters-in-law names? T: Yeah.

M: Now this note on the C-E-R-V-A-N-T-E-S property deal? T: Yeah.

M: We have interest income not being reported. We have rent income—I don't know how much in '64. Well, this interest income is coming from '64 all the way through '66; nobody ever reported that income? T: That goes into the sixty-two thousand.

[15] M: No, no, this is the interest income—you know what I mean—the interest on the note. That the bank was collecting and sending it here to your address? T: Yeah yeah.

M: And you see the thing that makes it so bad is that it's in your son and daughter-in-law's—you see the whole picture falls in how much is the note worth it's—and then the rental income. It could be very little or it could be a good amount? T: The rental from the places over there is very little. I had to take care of the places over there.

M: Okay, let's get back to '64. Now I have four copies of money orders two of them from UCB made out to Bertha H. Himes each one for $250 dated May 1, 1964, total $500; and then we have receipts from the Bank of America, Baldwin Park Branch. Did you have an account there? T: Yes, I had an account there. A long time ago.

M: So that's another thing, you told me you never had any bank accounts. T: I had bank accounts. Sure I had bank accounts.

M: Well you told me. What's this one over here on the Delt Investment Company? You told me you never had any—you told me it was going into the savings account over there. Now there was another checking account there and we saw that money coming in over there. I have no idea where the money is from. I have no idea how much money is there anyway. T: Can't you check with the bank?

M: Don't you have any bank statements? I'm not going to do your [16] work for you. T: I don't want you to.

M: Because I don't know what you've got in there. T: I know. I don't want you to do my work.

M: So okay. This loan there would appear to be note payments of $1,000. Now I'm sure we have a refrigerator going out to Malibu. You have it down here for $275 with a receipt for it for $207. T: And $207.95, Baldwin Park Hardware. 275 up there.

M: Yeah, I don't know how much— T: —Wait a minute, there was something in there.

M: Well, that's besides the point. I don't know if that's on a note or not. You can't show it on a note but it would have to be on a note. T: I don't have a receipt for anything.

M: Well, how am I going to prove it? How am I? T: The lady didn't give me a receipt for anything.

M: Well, how am I going to prove it? T: The lady didn't give me a receipt at any time.

M: Well, you ought to pay in check. I know you don't like check but what other kind of proof are you going to have? I mean when we come in and trying to come up with what the true story is. I mean we cannot. T: Wait a minute I'm going to figure that $275 out.

M: Compared to 90 some odd thousand let's don't worry about it. So in effect what I have shown is what? T: I

gave her cash. It doesn't make any difference whether you believe me or not. I did.

[17] M: Well I know, but for your sake and Federal income tax—that's another thing. Let's look at '64, we have $52,000 at least—53 when you add the $1,000 in the other bank account that I don't know about; less $1,000 that you can prove on payment of a note now we're down to $52,000 taxable income. T: That was Bertha Himes.

M: From Bertha Himes? T: Right.

M: So even with the deductions you have close to $50,000 taxable income. T: Not that much.

M: What do you have to prove otherwise? T: Payments on the house here.

M: Payments on the house here? Okay, say you have to pay interest, with all the deductions and everything it's not going to be less than 45 or $46,000. T: Oh it will be more than that.

M: Well you see, a lot of these expenses are not deductible. I mean the principal payments on the house are not deductible. T: Yeah, but there's 200 some odd dollars interest on the God damn thing.

M: Okay, so you have $2,400 that you're down to. Well, you're down to—well let's see, we have 52,000. I'd have to find out how much is in that bank account and all those deposits are going to be income unless you can show otherwise. T: Ha, ha, ha, ha, ha, ha, ha.

M: We're talking money. [18] T: Ha, ha, ha, ha. Yah.

M: Don't forget we got penalties on top of this thing once we get the income. So we have $52,000. T: Some of the money that I got from that I put in the bank.

M: Prove it. T: Come on now.

M: Well. T: How can I prove it?

M: Well, I'm the Agent, you're the taxpayer. T: Ha, ha, ha. Well, you said let's be realistic. I got to get the money from some place.

M: Yeah, well that's what I'm poking at. T: All right.

M: Okay, of course I don't know—I don't have any idea where you got it. You see, okay. You see when I see money

coming up—for instance this $1,000 deposit, what am I going to think it is? T: Money earned.

M: That's right. T: Sure, it's money earned.

M: It should be on the tax return. See, I don't know how much else went through but there's just this $1,000 here. Just as soon—we can find out—$52,000 right there. You paid out a $1,000 you can prove on the note, okay, take the figure. T: More than $1,000.

M: Well, that's what you can prove—money's written down on that piece of paper. T: There's no way I can prove it?

[19] M: Okay, so $1,000. So even going along with all this—$3,400 in deductions approximately and figuring even giving you $2,400 in interest and giving you two exemptions, $1,200, that's $8,000. So we're down to $45,000 taxable income for '64. T: How about my car? You said my car?

M: I already did. T: It's already there?

M: Car rental, insurance and gas, I didn't even take anything off for personal use. So look, we got $45,000 in taxable income in '64; from my recollection the tax brackets were higher in '64. T: Well, I tell you what to do. You tell me how much I owe and I'll pay it. Now that $40,000, I'm going to pay it. I have to pay it. Because I don't want to go to jail on account of it. You can take it from there. Now you can call up Fischer anytime you want to and ask him.

M: Well, let's look at '65. T: '65 was the deal with Foxie. I gave her $10,000 in cash and that's when she gave me the receipt. She wanted another $10,000 and it was impossible to give her, that's all.

M: Yah, yet she swore under oath— T: —I don't care what she swore. She swore under oath for a lot of things. She lied in there and she contradicted herself four or five different places in there.

M: Well, she said that under oath. T: I don't care what she said under oath. Her income was pretty good and her bills for the dogs ran around $10,000.

M: I thought she was well-to-do? [20] T: She wasn't well-to-do. Her father was. She was getting her income from him.

M: If I recall correctly, she said you went to her and wanted her—you and a man by the name of Edwards and Krieger— T: —Krieger wasn't involved in it at all.

M: Well, his attorney was taking her deposition? T: Yeah, but there was another piece of property that was involved there.

M: Yeah, it was the Barstow property. She said that you guys wanted to use her name on the Barstow deal. T: That was a lot of malarky. A lot of baloney.

M: Well,— T: —You determine now what you think is the best. Just like I said, you figure out what you think is the best and whatever the outcome is, I'll settle the consequences. I can't do anything more than that.

M: I'm not sure yet what we have. T: Well, I'm not living too God damned high. If you can't see that you're crazy.

M: Well, let's see, '66 you said you made no deals, you won the money in Las Vegas. T: I was lucky.

M: What we could do—the alternative way is to go through and add up all your expenditures and the income until you can show differently. See that's another alternative way of doing it. Adding everything that you spent. See, your wife wasn't working during that time either? [21] T: No.

M: In '67 you had at least one transaction in Las Vegas. How many times did you go to Las Vegas? T: I don't know.

M: Let's see, how many times did you go? T: Well, this year, I've been in there two times.

M: Three times. What did you do those two times besides gambling? T: One time I went there—

M: —You must have gone there more than three times last year. Who's this Doris McCloud something or other? What's your connection with her? T: We're friends.

M: Did you have any dealings with her? T: I did.

M; What kind of dealings? T: I sold her property.

M: When? T: Way back in the '50's.

M: Did you file tax returns prior to '63? T: Sure, every year.

M: How come you stopped? T: I didn't make enough money.

M: Wasn't it in '65 you were borrowing money from Applegate? Rosemary Applegate. I thought you told me you were borrowing in '65 the last time we talked? T: No, '61.

M: Well the one. Was the promissory note that way too? I thought [22] you told me you were borrowing in '65, I'm talking about? T: I have to go back three years. She died in '65.

M: Yeah, that's what you told me and you told me you got one letter from the estate or somebody. T: Yeah, one.

M: And that was all you ever heard from them? T: Yeah.

M: How much money—I mean how much money did you get say from '63 on from Rosemary Applegate? T: I can't remember.

M: So you tell me you haven't borrowed money from her and you're living on that little income you had from '65 and '66? According to this and what you lived on and assuming you paid the 10,000 back to her, you're living on nothing. It's just physically impossible to do. T: It's not easy.

M: So you see, that's what I have in the back of my mind, all these things. Let's get back to this business. How many times during '64, '5 and '6 did you go to Las Vegas? T: To Las Vegas? Oh God, I don't know.

M: Quite a few times? T: Yeah.

M: What were you doing all this time? T: In Vegas? Get a little property, turn around and sell it.

M: See, so you were going to Las Vegas '64, '5 and '6—and you didn't sell any property? T: Ur ur ur ur ur.

[23] M: Why did you keep going? Why did you keep going over there, if you didn't sell anything, or for at least the last four or five years? T: The only thing that I know is that I sell real estate. The only thing that I know, I try everyway possible to make money. The only thing that I can say to you and you figure out what is best for both parties concerned and whatever the consequences are, I'll pay. I can't be anymore fairer than that.

M: What's best for both parties? T: That's right. Isn't that the best way for you and me. You're representing the government and I'm representing myself.

M: We have a real problem there. I know we have like, for example, in '64 really a great deal. T: When I pay that $40,000 I won't have made anything.

M: Hum. T: When I pay that $40,000 I won't have nothing.

M: But let's be serious now. The last payment you made were in early '65. T: Yeah.

M: You know you're not going to pay? T: When I do, are you going to knock it off my income tax then?

M: Well if you do, yeah. T; All right.

M: The thing is you really don't have any intent to pay. You can say yeah I'm going to pay it—I'm going to pay it for 50 years. Look at the note? See I don't know what is fair to both sides. T: What is fair to both sides? You put yourself in my place—you're [24] in your place already, put yourself in my place and then figure it out?

M: See, I don't know. I don't know what to believe. I have to somehow justify, now for example these notes? Right now, I can say, for example, he had the notes, he doesn't say anything about what it concerns, it just says $93,500. What really bothers me—I don't know how many other things are going on. T: Well, there's nothing going on.

M: Like those bank accounts, like Delt? T: Well, that money is from the sale of some of this property.

M: You couldn't find those statements? T: Well, I don't know where the hell they are.

M: You don't have your '67. T: I'll have it for you in three or four days.

M: Yeah, but the damage is done now. Just because for instance you file these returns in August of '67, it's still delinquent. You see the problem is simply when you don't file tax returns and then we somehow catch up with you and we go out and get them, it doesn't mean you're off the hook. T: Well, I wasn't figuring that. I wasn't figuring that. I knew that one of these days you'd come down and see me and I'd have to explain, that was what the man explained.

M: What man is this? T: The man who helped me fill out my income tax papers.

M: Is that all he did? Is type them out? T: Beg pardon.

M: Just typed them out? [25] T: He come in the office. He had a machine and figured them out there. I didn't what he was doing, ha, ha, ha, ha.

M: You told me that you didn't go to Las Vegas that often? How do you handle those deals in Las Vegas again? T: Beg pardon.

M: How do you handle those deals that you said that you don't really own on those sixteen lots? What's the deal on that? T: First we got five lots—I mean five acres, and we split them up in lots.

M: Subdivide them? T: Usually, just on paper, see. That's on the sixteen lots.

M: You got some deals working with them? T: Well, it's—there's not enough money involved with them in order to do anything big.

M: I think you told me that you put up security from loans from your brother? T: Yeah.

M: And that's worth pretty good money? T: Yeah, the time that I went and the land was there. The property came under the corporation.

M: How long ago was that? T: Back in the '50's.

M: When was the last time you had any transactions with the corporation? T: I never had any transactions with the corporations.

M: I mean you own some of the corporation? T: I did.

[26] M: How much did you own? T: (No answer.)

M: Who owns the land in Las Vegas? What's his name? T: It's under the corporation's name.

M: What's the corporation's name? T: Pioneer Land Investment.

M: Is this the same corporation? T: Yeah.

M: Well, it's still active it owns land? T: Beg pardon.

M: It's still active it owns land. It owns this property in Las Vegas. T: No no.

M: How did this deal work? When you sold this land in '67, how did you handle that? T: Under somebody else's name.

M: And so you got somebody to act— T: —As the agent—

M: —Front. Did it have to do with your son and daughter-in-law? T: Yeah.

M: You only sold one of those parcels? T: Yeah.

M: How did they get out of the corporation or did the corporation— T: —The corporation had nothing to do with it.

M: Oh, so if the corporation owns the land and a piece of that land was—in effect, you got a commission, is that what you are saying? [27] T: No. No, no, no, the corporation. The land that the corporation owns is still owned and hasn't been sold.

M: This is other land? T: Yeah.

M: Is this other land—is this the individual that owns the land that's subdivided the property? T: Yeah.

M: Now I'm confused. It's in the Pioneer's name but they don't actually own it; is that what you mean? See, I'm confused as to who owns what simply on that land we're talking about. T: Let's go back a little bit.

M: Okay. T: In 1960 or was it '63, some doctor had some kind of a deal and he said that I owed him $60,000.

M: When was this, in '63? T: I think it was in '63 or '62 somewhere back in there.

M: How did he say you owed? T: No, the money that he loaned me—he said that he loaned me $60,000 and turned around and sued me and at that time, I was part owner of the corporation and in the meantime, as soon as the thing was going to start popping, I changed the property to. I don't know whether I should tell you this or not, ha, ha, ha, ha. I changed the property into somebody else's name see, because the corporation had an alter-ego. In other words, me and the corporation were one in the same so as it happened he had a hold on me but how the hell it happened—a miracle happened, the guy let me off the hook for a few days because of some court dealings [28] he had done in Las Vegas and in those few days, I changed the property out of the corporation's name to a private individual's name who is still there. This private individual deeded back the property which we have the deed and it's in the attorney's office, Las Vegas.

M: He deeded it back to the corporation? T: But it's not recorded.

M: Who's the individual? T: One of my relatives.

M: What's their name? T: Ha, ha, ha, do I have to tell you?

M: Well, it will be better for you. I got my job to do. T: I mean, I mean.

M: You see. T: There's a record anyhow.

M: You see you know what the deal is, just think like this. This was in '63? T: '62, '61 or some place back in there. I could find out.

M: You know there's a lot of information I still don't know. Every time I start talking we find something new. T: I know, but—you see I don't want to jeopardize. People and things have no concern with this.

M: It certainly does have concern with this. You see, for example, in that situation if I find out you know transactions going on somebody is going to have to pay some taxes you know. T: Yeah, yeah, I understand. Yeah but

there was 200 acres, Lee Canyon, up there that's still there. There's a 199.31 acres. [29] That's what it is. It is still there.

M: So in effect, you own the property of that corporation? T: The corporation?

I have nothing to do with it anymore.

M: Well, did they give you something for your interest? T: I sold it for a dollar.

M: When did you sell it? T: In the early '60's to my son.

M: What has he done with it? T: Nothing. He was up there. He goes up there and camps on it.

M: How much is it worth? T: Well, I'll tell you exactly what it's worth. I got about $10,000 in the road, I got about $8,000 in the well, and I paid $5,000 for the property. It's worth about $20,000.

M: Why did you sell it to your son for a dollar? T: So I wouldn't have to be—

M: —So it wouldn't be in your name? T: Be in my name.

M: In other words you still got it. This was just a dummy transaction. You see you got a real problem too. You say well I sold it for a— T: —for a dollar.

M: Well then, you know what you've got? In effect, made a gift of it to your son. T: Just, just.

M: Let's face it. You did it to get it out of your name. T: Well, that's all.

[30] M: I should know everybody that is involved in all this? T: Well, well.

M: You see all these transactions—somebody along the line—now, things everybody's switching back and forth. T: That has nothing to do with it.

M: It certainly does. T: There was no money involved in it at all. I bought that property in 1948 I think it was, see.

M: Well, but the corporation deeded it over to you. T: No, it's—

M: —It went to a dummy, didn't it? T: Yeah.

M: You got it out of the corporation? T: Yeah.

M: Well, when you get something out of the corporation, that's a return on the money you have in the corporation. We don't know—that could be income right there. T: What do you mean? There was no money contracted.

M: Well, I know. They don't have to be. You can trade a house you bought for $10.00 worth $20,000, trade it for a house that's worth $20,000 and just keep on building up and never give a dollar in cash. It could be a dividend from the corporation to you. In other words money comes out from the corporation to you now. Did the corporation file a return? T: No, because there was no transactions. I asked the lawyer in Las Vegas about that and he said that as long as there's no transactions, you don't have to file. It's a corporation that [31] has no—how did he say it? Well, it's not alive, it's dormant.

M: Who is this person's name that it's in? T: Alnes.

M: How do you spell it? T: A-L-N-E-S.

M: A-L-N-E-S, what relationship? T: My niece.

M: Do you know the first name? T: Well I can't think of his first name. Call him Larry.

M: So then how did you sell—you haven't sold any part of this in '67—you know that deal you had? T: Yeah.

M: This wasn't part of this property, was it? That's in their names? T: No, no, no.

M: Okay, let's get to that—that property? T: What property?

M: You know, which you sold. T: It was another piece of property that I bought. I didn't buy it. It's a long God dammed story. There is two and a half acres sold for $8,000, $800 for commission. That's all.

M: Where did you get hold of that property? T: Finagled it.

M: Finagled? How much were you supposed to pay, you said $250? T: No, not this piece.

M: How much were you supposed to pay for it? T: For this piece here? Let's see.

[32] M: I assume that went under somebody else's name too? T: Yeah.

M: Where did you get it from? T: Gayus.

M: How do you spell it? T: G-A-Y-U-S.

M: Do you know the first name? T: Irene.

M: Irene. And who did you sell it to? T: I sold it to—got a simple name—I can't think of the God dammed name.

M: Well, who did you sell it to? Who's name did you use? T: Gilbert Jones.

M: Is that a real person? T: No. I tell you I can get all the escrow papers for you and everything else.

M: We can't. T: For this deal here, I can get them. The whole transaction.

M: You looked in on this, say that was '67. You lived on $8,000 that was $7,000 in '67. You don't show any income. T: No, you see I made that deal where I made that three, no it was four, another four thousand. I didn't make it. I borrowed 4,000 from Gayus.

M: Do you have a note? T: No it—

M: —did you ever pay anything back on it? T: Beg your pardon?

[33] M: Pay anything back on it? T: No, I have this one I have to pay back.

M: You have to pay Bertha Himes back. T: Well, when I pay it back, I'll prove I paid it back and that's it.

M: Well, the thing is, just take it all around—it's hard to get intent. T: Want a cigarette?

M: No, thank you. T: I thought you smoked.

M: I started at one time, but everytime I did it, I used to get sick, so I gave it up. Sure wanted to bad when I was working in the gas station, four years I pumped gas, wanted to be one of the boys. Smoking made me sick though. T: I wish it happened to me that way. Ha, ha, ha, ha.

M: You borrowed 4,000 from Gayus, sold property for $7,000; let's see, were you still leasing the car at that time? T: No.

M: What were you getting around in? T: What year?

M: '67. T: I had that white Oldsmobile.

M: Where is that? Are you leasing that or did you buy it? T: That's my brother's.

M: He gave it to you? Are you the registered owner of it? T: No.

M: He is? T: Yeah.

[34] M: You don't have anything real with your name anymore? T: No.

M: Boy, everytime I ask a question, I find out something new. T: Don't ask any questions. Ha, ha, ha.

M: Don't ask questions? T: I'm not trying to hurt nobody.

M: Everytime I ask questions, I get deeper and deeper. T: Just answer from now on.

M: Just answer—ha. T: What I'd like to do. I would like to make enough money so I can help develop this land over there in Lee's Canyon.

M: Oh, this is what the corporation owns? T: Yeah, that's what I'd like to do. Well, I'll tell you, if I can have income of 60 to $100,000 a year—

M: 60 and 100,000? T: That's how much money the corporation would make.

M: Yes, what would they do? T: Put in a trailer court.

M: Oh, a trailer court? Where is it located? T: Right inside the National Forest up in—you know where Charleston is?

M: No. T: Well, it's west of Vegas forty miles, as the crow flies about 30 miles.

M: How would you do it? How would you develop it? T: Well, first of all, it would take about $5,000 cash to make —I got a road in there, the road is.

[35] In other words, I need $5,000.

M: It costs $5,000 to have it surveyed. T: Surveyed and graded costs about $5,000. It would cost at least $10,000 for the road.

M: That much? T: It would cost about—I'd say at least $7,500 for the well. All right, that's $22,000. I'd like to get ahold of at least $50,000 . . . . . I get that thing in just

like I say. All I have to do is develop 40 acres. .... they'll tell me what I have to do and I'll go from there see. And I'd do it—leasing spots for trailers. Not by the night or anything but the year.

M: By the year? T: Big trailers only. I was over there about three weeks ago, there was snow up there.

M: Snow? T: Yeah.

M: Must be pretty high up? T: It's 8500.

M: 8500? T: Yeah. And then it's—see from Las Vegas .... and come 28 miles and then you come up this way ten miles, it's a hell of a spot. There's nothing there at the end of the road, it stops right there. We got a ski lift and we have tow ropes and they're planning on putting up a ski lift. Costs a lot of money to prepare the ski lift and I'm only about four miles from there.

M: This is the land you own through the corporation? T: Yeah, that's what I would like to do if I could get ahold of [36] enough money to do it.

M: What do the other people of the corporation think about it? T: They're willing to go.

M: How many, you guys have stock? T: Yeah, they have stock.

M: What do you own, a hundred per cent of it? T: Yeah, I did.

M: What do you own now? T: Nothing.

M: You sold that? T: Well, I give it to Jack and Jack is the President over there. Jack is the President of one corporation and the rest of the family is Vice President, Directors and what-not. And the rest of the family's Directors and what-not.

M: So it's actually family controlled? T: Yeah, so it's only family.

M: I see. T: So I can't sell that stock.

M: No. T: I mean I can, but I won't. Since I have that land. Since we own the land over there, all I have to do is pay the taxes and that's all.

M: There really isn't anything else to pay. T: That's all.

M: That is pretty country. T: That's a bull dozer up there making a road. This guy is a reporter from the Journal. You know who opened that road, [37] Marge and Gower Champion.

M: Oh, they did. T: You know them?

M: They're dancers. T: Just like I said, only forty acres got two levels on it, the little point here where there's a house is part of my property, part of the property is down here and the rest of it belongs to the government, and there's a great big gully in here and I thinking of damming it up and making a lake in here. Take about forty acres which would be perfect for something like that, see. There's another level over here . . . . about 35 acres right up on top . . . . three levels and then stop here where the well is.

M: Sounds like a good deal. T: Well, it's a good deal if I can ever get the money together. . . . I had a chance to sell the property . . . . that's all.

M: A hundred dollars a year for the whole thing? For the whole property? T: Yeah.

M: I see, nobody knows how much it's worth. T: Well, no.

M: I see. T: If I sold the forty acres for $10,000 an acre, that's $400,000—I'd have to pay personal income taxes.

M: Yeah. Well, that's property tax. T: So, we'll just leave it there until we get ready to do something with it, then we'll go in there in a big way then let the taxes go up and then we'll pay them. I don't want to lose the God [38] dammed property on account of taxes.

M: So you're—are you trying to get a buyer for it or trying to develop it? T: Trying to get people to see it my way, to invest.

M: Did you get anybody to invest yet? T: No, I haven't talked real serious to anybody—real serious like I talked to one fellow, he said to do everything would cost a million dollars. I said why do you talk about a million dollars, why don't you talk about thousands. I said we don't have

to go in such a big . . . . I said furthermore, they want me to put the whole property up for this amount of money, you know, but I figured like this, if I'm going to develop forty acres of it, I'm going to put the loan against the forty acres and not the rest of it.

M: Yeah, I see. T: If I put it against the whole of it and I can't pay it, I lose it—then what have I got left then. So you've got to be very careful on how you do and how you act. Just like I say, if I get enough money to get started I'd have an income.

M: 60 to $100,000 is a lot of money. T: That's all just forty acres though.

M: Just forty acres? T: And on the side of it—here's what I want to give a fellow who wants to lease it for a year. He'd have to lease the whole thing. That runs into a lot of money.

M: Sure. T: It would run up to $175,000 a year which isn't bad for this [39] property because it's worth that much. Take that kind of money in there with big money, but if you went in with big little money, I wouldn't lease it to him. Like one time a fellow spoke to me, he said, I got a man with ten million dollars and he wants to invest it in Lee Canyon. I said why don't you go down there and show the man the property, I don't know the man, I don't know if he got that kind of money, I don't know anything so why don't you show him the property and that was it. Everytime I get somebody who wants to purchase it and want to get the best part of a deal and I get . . . . I don't want to do it. If I had a . . . . you see, up until 1960, the property wasn't worth nothing because there was no demand for it, now people are going—you know there's over 300,000 people in Las Vegas right now. The demand is getting bigger and bigger and bigger. Everybody wants to get out of the hot heat and get up there. The degree during the day never gets over 78. Down in Las Vegas, it's 112, 114, up here in the shade you have to wear coats. As soon as the sun goes down the damn thing drops down to 40 degrees and you have to have a mackinaw. That's a spot. So close and really something.

THE FOLLOWING PAGES TO END OF TEXT WERE TRANSCRIBED BY MARY M. HANSEN ON DECEMBER 4, 1968.

[41] T: Now see this. I had this spot ad and it ran for about eight months in the paper in Las Vegas every day and I mean I gave it a lot of publicity. I had a lot of fun up there. One time I gave a barbeque. I had enough hot dogs and hamburgers and soft drinks for about 400 people. You know how many was up there? About 5,000.

M: Oh, really. T: Honest to god.

M: 5,000 people? T: They came in there by droves . . . .

M: It sounds like a good deal. T: I'm working for, I'm working to accomplish something so I can have it from now on. If I ever got started it will be from now on.

M: Something for the future. T: For me, for my kids, for my grand kids and for everybody else.

M: So that was in '67, what you've been trying to do up there. T: I'm trying to figure out a way where—I don't want to lose the property, I don't want to get hurt, I don't want to hurt the other person, see, because I for one know I can get 25% of the business not the property that goes on there if they would loan me enough to develop it, but they don't want that.

M: They want something with a little more security? T: Well, I could give them the property for security until we got the business to a point—I won't even do that. I don't want to jeopardize the property until—I don't want to hurt nobody, and it doesn't cost very much to keep it. I've had it for [42] 20 years. I hate to give it up for nothing now. So, you know if I had big money or . . . I'd be developing that land up there and not fooling around down here.

M: Well, of course, a lot of this money you're talking about was four years ago. Three year ago too. T: Yeah, I know, but I was . . . .

M: You had a lot of money. T: Yeah, I had quite a bit of money, not enough to do what I wanted to do.

M: Your expenditures were pretty high too . . . T: Well, anyway, you figure it out and I'm not going to argue with you.

M: Well, I don't want to argue either. T: You figure out what you think I should do and I'll try and do it.

M: What do you mean what I think I should do? or you should do? T: Whatever you think I should do with this here, with the income tax. You figure out what you think is right for both sides and I'll just pay whatever I have to pay.

M: You mean— T: Now if you think that $52,000 is ordinary income and all the rest of the money is ordinary income, you'll have to figure it that way, that's all. But, I had to spend money to live and I had to do this and I had to do that and everything else I had to do.

M: What would you suggest I do, I mean if I didn't— T: What I wish for you to do—

M: You said, you know you would. [43] T: You claim that 52,000 is that 40,000 that I don't have to pay—that I had to pay—and you say that my intention is not to pay—my intention is to pay it as soon as I get the money. I'm not able to pay it all at one time, but I'm going to pay it.

M: How would you want me to pay it? T: Well— In other words this promissory note for 95,000 is no good, is that it?

M: Well, I just wanted to hear how you wanted me to do it. T: Well, can we forget it? No, I'm just kiddin' now.

M: Well, you know— T: Now I'm going to have to pay it regardless.

M: You know—forget it— T: No, no, no, you can't forget it. You can't. It's impossible. You have to show something so—

M: Well—uh—what do you mean show something? T: You have to show something for your work.

M: Well, I have work papers. T: Yeah, I understand that. According to your work papers now what do I—

M: I haven't done anything in my work papers. T: What would be the outcome? According to your work papers there what would be the outcome of it.

M: Well, if you want to know, I do my own work. I mean, you know, uh, it's my responsibility, you know, what I put in my work papers. I know it myself and whoever looks at it knows what's on the paper. They don't know anything else, but they know what's on the paper. It's, you know, my audit. [44] T: Well, if you feel like that money I have applied there and if you figure it's all income and you take a certain amount of it off and the rest of it you say I have to pay income tax on it I'll do it.

M: What do you mean? T: There's only one deal in there that's big and that's that Bertha Himes.

M: There's a lot of money involved in there and the fact is too you see you're getting a higher bracket there and you're talking about a good amount of money. And, you see, the thing is that you didn't file any returns. T: But we can't go back.

M: No, I agree. I agree. I want to know what you want me to put down. T: I made a mistake and I can't—the only way I can rectify it is by paying for the mistake that I made. Now which way I pay for it is up to you.

M: In other words you would want me to put this down and count the note as being good or at least the payments on it or what you put down—well, you tell me what those lots are worth and then tell me how many payments you put down—you made— T: Well, I—I—

M: And then work it on that basis. T: Well, then I know I gave her over ten, Bertha Himes. I gave here over $10,000.

M: Well, yeah, I understand that, it's just—now, for example, what would you want me to do in '65? T: That was Bertha Himes.

[45] M: No, in '65 that was Fannie Fox. T: Oh, Fannie Fox, oh. Well, I gave her $10,000. There is no way I can prove it, no way at all, any other way at all except that

I've got that note from her that I gave her $10,000. Now, she wanted another ten and it was impossible to give. I give her $1,000 in cash and I give her $10,000 in cash. I think it was about four or five days prior I give her the thousand.

M: We can do what you said before—forget it. T: Forget what, the 10,000?

M: Just take the notes as they are and, as you said, forget the whole thing. T: How would the outcome be on that?

M: If I do like you said before, forget the whole thing?—You'd be scot free. T: Do you think that's justifiable? How about some coffee?

M: Fine. T: What do you want in yours?

M: Black is fine. T: Did you ever see something like this?

* * * * *

M: Multiplex? Oh, an old-time typewriter. Isn't that what it is? T: That's what it is.

M: How old is it. T: It was built in 1880. This ribbon on here is the original ribbon. It's got two sets of type . . .

* * * * * *

M: There you go. [46] T: Yeah.

M: Hit it harder. T: That one says type . . . . It has a different set of type.

M: How about that. T: That's how you type the capitals. Both sides.

M: I've never seen anything like that. How long have you had that? T: I've had this—I bought this in Boston in 1916.

M: How much did you pay for it? T: You'd never believe it—$10.

M: $10. T: I was offered a thousand for it.

M: You were offered a $1,000 for that. T: Yes, they got one like this—

M: That's nice. T: In the White House.

M: Do they really? T: Yeah.
I don't think they made over fifty of them.

* * * * *

Just liwe new—look at the rubber on it.

M. Yeah. T: And that's the original casing on it.

M: The original case, somebody must have . . . . T: We had our house robbed twice in about two months. They robbed it once and then they came back and robbed it again. I hide it up here, see?

M: You hid it up there—that's a good place to hide it. [47] T: And they took my projector. I had the projector, cameras, a whole bunch of—a lot of good stuff—and everything else. They took everything, a typewriter—

M: . . . $4,000, wow! T: It's a museum piece. I hide it.

M: I don't blame you. T: I hide it in my own house. It was 2 o'clock in the afternoon when they came in and robbed it the first time. I just drove up and they must have just left. They took the sewing machine, my projector, camera, oh, I don't know, a bunch of stuff. I had a motion picture camera; that was gone.

M: That's too bad. T: . . . Two months later they come back . . . Las Vegas . . . silver dollars . . . . They took it all. I had one of those, you know, ties with a silver dollar on it.

M: Yeah. T: They took that. And I had a—when El Rancho first opened up they made blocks of paper weights about that big you know . . . with a silver dollar in the middle— They took that. I mean stuff that you couldn't buy, see.

M: Yeah. T: They got away with that. I was thinking of selling that one day.

M: How much were you going to sell it for. T: Well, a guy was going to offer me a $1,000.

M: A $1,000. That's a lot of money. T: For something like that? It's worth more. A regular museum piece. [48] You know when the Kennedys got in the White House—Jacqueline Kennedy wanted to get certain things in there.

This is one of the kinds of typewriter she wanted in there. She got it in there. . . . I thought they donated it free or—

M: Probably those guys got lots of money anyway. T: . . . That was built in 1880 . . . . We didn't make very many of them—only about 50 of them.

M: . . . T: Original tape on it—I didn't think a tape would last that long. I thought it would dry out. I went back there—the reason why I went back to Boston Al Capone's cousin or something like that—he lived in Las Vegas—I showed him some property. He says . . . when you come to Boston . . . business. I said O.K. so I went up there. I wasn't able to get ahold of the guy when I went up there, so I met some people over there and I want . . . some antique furniture. You ought to see some of them. They were putting the freeway through Boston—it's not a freeway—well, we call it a freeway out here—over there it's not, and the people had to move the house. This old lady was 80 years old and she was spry as a 17 year old girl. She was going around there just like she was young. So, she says, look through the house and whatever you want I'll sell you. I said O.K. The first thing I spotted was this typewriter and I said, what'd you sell it for? She said $20. So I went down a little further and I bought a—there was a big coffin. Her husband was supposed to buried at sea in this coffin . . . and I asked he what she wanted for it and she said $150. I rounded up [49] some more stuff around there and a I didn't buy nothing else cause I didn't have no way of bringing it over here.

M: Yeah. T: This coffin weighs about 400 pounds. It was thick wood about that thick and it was long—seven foot long, and . . . feet wide and so I gave $150 for the coffin but she wanted $200. I gypped her down to 150 and gave her $10 for this. She said O.K. so she sold it. She's still got the coffin because I couldn't bring it over. I just brought this . . . .

M: You got a good deal. It's worth a $1,000. T: I'm telling you—the antique furniture over there. Anyplace you go they got—they're a hundred years old or—

M: Sure, I imagine they would— T: I got a chair here that's about 150 years old. I bought it for five dollars. I used to be an athlete one time, believe it or not. I run a mile in four minutes and 20 seconds. I held the high school record for about 15 years—the world high school record for about 15 years at four twenty.

M: That's good time. A. Yeah, that was a good time. . . . I went to Garfield over there—at one time they had a . . . They were making a picture—that was 1929. They were making a picture—The All American . . . Murphy. They had all the guys in the neighborhood and they had all the guys who were outstanding athletes in that picture. And I was one of them.

M: That was great. T: That goes back almost 30 years . . . college. I used to run [50] the quarter, the half and on the relay team.

M: You were busy. T: I tried out for the Olympics in 1932 and I run the quarter in 47.7 and I got third place. The world's record was 47.7 at that time.

M: Yeah, I know—that's good time. I don't think I could run the mile in 10 minutes— What do you think? T: I kinda' wish you'd forget it.

M: You want me to forget it? Well, I'm taking a certain amount of risk. I can justify my papers yet I'm taking a risk. T: Tell you one thing, you won't be sorry.

M: Well, what I mean, in order for me to forget this I have to have something to justify—you know—to warrant the risk. Don't forget we're talking big money, plus penalties and a lot of other things. T: Well, what would you suggest?

M: What do you think? T: Well, why don't you give me an inkling of what your thoughts are and then if I'd consider.

M: Well, let's see. Let's just be practical and see how much money you owe and what could happen to you on five years—five years. Just take the one year for instance, $45,000 of taxable income—that's giving you a lot of bene-

fit of the doubt. You got one year roughly—recollections on— T: 15,000.

M: That's before you collect interest and penalties. Don't forget you had taxable income in '65. You have unreported income in [51] '66, gambling winnings, etc. Lord knows how much money you borrowed. There's a strong— Let's quit kidding. T: Yeah, yeah.

M: Let's talk man to man. T: Yeah.

M: O.K. Those notes aren't worth anything, you know that. Let's be serious—let's see what we're talking about. Those notes aren't—they'd laugh at them. T: Yeah. Do you think I could ask people to prove them.

M: Well, it'd be really tough in your situation. I'm just laying it on the line. T: Yeah.

M: Now and of course you see you haven't filed '67—you haven't filed five years, well, five years. Well, not only— T: I didn't make enough money this year to—

M: Well, you had gross receipts though. T: Yeah.

M: You see the point is you see and they can look and see everything that's done in somebody else's name. That bears pretty heavily . . . and very, very, very severe consequences. Of course, again, I think I'm taking a risk. T: Of course.

M: . . . You know . . . . Why don't you say something because I don't know—I want to see what your ideas are, what do you think? T: The only thing that would be involved in it would be the property.

M: Well, the only thing is I mean I have to sure it's worth something. You know I can see what's going on here—land being purchased [52] for notes. For example here—what would I . . . I'd be assured I mean, because I'm not going to take the risk of no changing five years of returns in effect for nothing. What are your thoughts? T: Well, I have five acres which isn't worth—I'll say it's worth 5,000.

M: Well, where is it located? T: In Las Vegas.

M: Whose name is it in? T: Frances Esterbrook.

M: Frances Esterbrook? Just a dummy? T: Yeah.

M: Well, what would I get—what would you give me? I mean would I get a deed or something? T. Oh yeah.

M: How soon could I get it? T: Oh, five days.

M: Now, if, this is five acres, what part of Las Vegas area? T: South. Do you know Las Vegas at all?

M: It's been a few years. T: All right, Las Vegas is up here. The airport is here, the Hacienda here . . . . It's right in about here. The L.A. Highway—it's over here, so there's about four miles. But it's actually worth that much because Howard Hughes is going to build his airport—there's a big airport that he's going to build. This is . . . . up here. This is the Blue Mountain line over here. He's going to build the airport right here. This is the city [53] of Arden. It's a ghost town right now . . . . but there is other property I could show you.

M: Well, what about this? Give me the deed to that property, the five acres. It's in the name of Frances Esterbrook—Frances Esterbook. Then if you want me to— Let's quickly go over this again, now. In return for my giving a no change report on '63, '4. '5, '6 and '7, you will give me property— T: . . .

M: Worth $5,000. T: Yeah.

M: You'll do it. T: Yeah.

M: O.K. Now, I want to protect myself a little bit on this deal. Now, you give me the deed and if it's not worth $5,000 I will expect the equivalent of that. T: Yeah, yeah, yeah.

M: O.K., you're on. We're got that settled now. I'll just no change and then you'll give me the property. T: O.K.

M: When can I have it? T: I'll give it to you Monday.

M: Same time? T: Yeah.

M: Here? T: Give me your name—I mean the name that you want it on.

M: Yeah.

Well, it doesn't matter; it's in Las Vegas. I can give you [54] my real name.

T: Do you want it in yours or your and your wife's name?

M: My own name. Now, I don't want you to contact my home at all. T: No, oh no.

M: Nothing at all. T: No sir.

M: O.K. That's the first— T: Don't put your address on it at all.

M: Oh, you just want my name. I'm sorry. T: I don't want your address.

M: O.K. we'll have this Monday—next Monday for sure, because I'm getting pushed on this. T: All right.

M: Is there any way of getting it any sooner? T: Can I call you at the office?

M: I'd just as soon you rather keep it you know. Well, could you get it this week? Because you see the thing is I'm getting pushed. We're talking money here don't forget, and— T: This is Richard A. . . . .

M: I'm sorry, I didn't write it clear . . . Well, you see, the only thing is I want to protect myself and if I can get it closed this week you see— T: I'll have it for you this week.

M: Will you get it to me by Friday? T: Yeah.

M: Do you think you can? T: Yeah.

[55] M: O.K. Did you want to set up an appointment for 10 o'clock Friday? Is that all right? T: All right.

M: Here? T: Yeah.

M: O.K., now. Remember it's the equivalent of 5,000. I don't care what it is. T: Yeah, Yeah, Yeah.

M: O.K., fine. I just want to be sure I'm getting my money's worth. T: Yeah.

M: O.K. T: And if you think or if you have any doubts that it isn't I'll give you some more.

M: You'll get it so it's equal to 5,000. T: Yeah.

M: I'll leave these papers here now. I'll get everything squared away here now. I might have to have you fill out

some kind of '67 return. I'll have to pick it up and show it in there. T: I will.

M: O.K. T: Friday.

M: You have that ready for me now. T: I have no papers here.

M: Well, I—I don't, I mean, I'm through with my work now. That was our deal, and I was just going to no change it and I can justify my report. T: All right.

M: But I don't want anybody to know about this. [56] T: All right.

M: You know— T: Silly.

M: Yeah. O.K. T: For both of us.

M: I know so let's just keep it that way. O.K.? T: That's all.

M: I have to protect myself. I'm taking a great risk. O.K.

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M: I think I've got everything I need now. O.K. then I'll no change those reports '63 through '67 and you'll give me that property $5,000 value. T: If you don't think it's worth 5,000—

M: You'll make it up. T: I will make it up.

M: O.K. T: All right.

M: Friday morning, o.k.

Mrs. Tatar: Is everything o.k.?

M: All set. Thank you very much.

Mrs. Tatar: Will you be here tomorrow?

M: No, I'll be back— T: Friday morning.

M: Friday morning at 10 o'clock.

Mrs. Tatar: O.K. I just wanted to know because I won't be here tomorrow.

M: O.K. fine. We'll see you then. T: So long.

APPENDIX 4

[224] Los Angeles, California, Friday, March 7, 1969, 11:17 A.M.

The Court: Well, we have another note.

"We now have an impasse. People are firm on both sides. What course of action do you suggest." Signed Dolores Kelsey.

Well, if there is no objection, gentlemen, I will read the Allen instruction. Mr. Novak?

Mr. Novak: No objection.

The Court: Mr. Ten Brink?

Mr. Ten Brink: I will object to the reading of the Allen instruction, your Honor.

The Court: You will object?

Mr. Ten Brink: Yes, I will.

The Court: All right. The objection is overruled.

Mr. Novak: Your Honor, I would also request that the Court give the jury the instruction that is, that appears in the third paragraph of Government's supplemental instruction—

Mr. Ten Brink: Excuse me, your Honor. May we approach the bench and have this discussion there?

The Court: No, no.

You want me to read what instruction?

Mr. Novak: The third paragraph in the [225] supplemental—

The Court: No, no. Overruled. Not yet, anyway.

This is the second time that this case has been tried. There was a trial a month ago and the jury was hung up. And this is the second time.

Now I am going to read you another instruction and after I finish it maybe you will have some questions.

Ladies and gentlemen:

This is an important case to the defendant and to the Government, and also to the administration of justice.

In all probability there is nothing to indicate that it can be tried better or be presented any more exhaustively than it has been on either side of the case. It is highly desirable from the standpoint of all concerned, the parties and everyone else interested, that you agree upon a verdict if that is possible.

The Court does not want any juror to surrender his or her conscientious convictions. Each juror should perform his or her duty conscientiously and honestly, according to the law and the evidence. Although the verdict to which a juror agrees of course, must be his or her own verdict, the result of his or her own convictions, and not a mere acquiescence in the conclusions of other jurors.

[226] Yet in order to bring twelve minds to a unanimous verdict you must submit the question submitted to you with candor and with the proper regard for and deference of the opinion of each other.

You should consider that the case at some time must be decided, some time it has to be decided, and that you were selected in the same manner and form and from the same source from which any future jury must be selected, and there is no reason to suppose that the case will ever be submitted to a jury more intelligent or more impartial or more competent to decide it, or that more clear evidence will be produced on one side or the other.

In conferring together you ought to pay proper respect to each other's opinion, with an openminded disposition to be convinced to be convinced by each other's argument.

On the other hand, if the larger number of your panel is for conviction, the dissenting juror or jurors should consider whether a doubt in his or her mind is a reasonable one, which makes no impression upon the minds of so many persons equally honest and with the same intentions, with the same desire to arrive at the truth, and under the sanctity of the same oath.

On the other hand, if a majority is for acquittal the minority ought to seriously ask themselves [227] whether they may not reasonably, and ought not to doubt the cor-

rectness of the judgment which is not concurred in by most of those with whom they are associated in the jury, and to distrust the weight or sufficiency of that evidence which fails to carry conviction in the minds of their co-jurors.

This is to say that you must not, any of you, adopt a stubborn, close-minded attitude towards your responsibilities here. It is important that you should reach and arrive at a verdict one way or the other, but only of course according to your own convictions.

You must not by reason of having taken a position at one time or another in the discussions then just stubbornly adhere to that position without listening carefully and re-examining your views and re-examining the suggestions and ideas expressed by the other jurors with a view of ultimately reaching a verdict in which you can conscientiously join.

This is very important and I urge that all of you and each of you give full consideration to the matters I have suggested.

In making this statement I again emphasize that no juror should surrender his or her conscientious conviction, and a verdict arrived at and to which a juror agrees must be his or her own verdict, the result of his or her own [228] finally reached conclusions and convictions, and not a mere acquiescence in the conclusions of others.

I suggest that you retire again and carefully consider all of the evidence in the light of the Court's previous instructions given at the conclusion of the testimony and the arguments, and upon due and full consideration of the instructions that I have now given you.

Any questions from anybody?

Don't tell me how you stand.

A Voice: No, no.

The Court: Don't do that, because if that is done then there would be a mistrial and we have to start all over again and we don't want that.

A Voice: No, what we were asking for was a re-reading of the indictment.

The Court: Certainly.

A voice: Is it possible for us to obtain a copy—

The Court: A copy of the indictment, yes. We will give you a copy of the indictment.

A Voice: Yes, we would like to have one if we might.

The Court: The clerk will be directed to furnish the bailiff with a copy of the indictment. But I will read it to you.

[229] A Voice: Your Honor?

The Court: Yes.

A Voice: We have another question. I wonder if we could have certain parts of the entrapment re-read.

The Court: Yes.

A Voice: Pertaining to the agent and the use that he made, the scope that he made use of.

The Court: What I am going to do is that I am going to read you the instruction that I have given you. And I am also going to read you one which says the same thing, somewhat maybe in different language.

A Voice: I think there a few words—artifice and—

The Court: Artifice and stratagem.

A Voice: Yes.

The Court: Let me read you the one that I have given you and I will read you another one which is similar, but the language is a little bit different.

On the issue of entrapment, where a person has no previous intent to violate the law, but rather with an innocent mind is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of entrapment because the law as a matter of policy forbids a conviction in such a case.

On the other hand, where a person has the [230] readiness and willingness to break the law without persuasion, and the Government agents merely provide a favorable opportunity to commit the crime, entrapment is not a defense. Thus, Government agents are not precluded from utilizing artifice and stratagem to apprehend a person who is ready and willing to commit a crime. For example, it is

not entrapment for a Government agent to pretend to be susceptible to the receipt of a bribe and to afford the opportunity to offer a bribe to a person who has the readiness and willingness to commit such a crime.

If, then, the jury should find beyond a reasonable doubt from the evidence in the case that before anything at all occurred respecting the alleged offense involved in this case, the accused was ready and willing to commit the offense charged in the indictment, without persuasion whenever opportunity was offered, and that the Government agents did no more than offer the opportunity, the accused is not entitled to the defense of entrapment.

However, if the jury should find from the evidence, or be unable to find beyond a reasonable doubt that the Government's evidence excludes the possibility that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the defense of entrapment is a good defense [231] and the jury should acquit the defendant.

The jury should bear in mind that the burden of proving beyond a reasonable doubt that the defendant was not entrapped is upon the Government, and therefore if the jury should have a reasonable doubt as to whether the Government has proved that the defendant had the readiness and willingness to commit the offense charged without persuasion, you should acquit the defendant.

The law recognizes two kinds of entrapment, unlawful and lawful entrapment. Where a person has no previous intent to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment because the law as a matter of policy forbids a conviction in such a case.

On the other hand, where a person had the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is no defense, but is lawful entrapment.

If, then, the jury should find beyond a reasonable doubt that the offense charged in the indictment was brought about by the Government agent, but you further find beyond a reasonable doubt that the defendant was predisposed to commit the offense charged, if you find beyond a reasonable doubt that he was ready and willing to [232] do so, and you find beyond a reasonable doubt that he merely had to be persuaded that this was a safe opportunity to commit the offense, then the defendant is not entitled to the defense of entrapment.

If the accused had no previous interest or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the defense of unlawful entrapment is a just defense and the jury should acquit the defendant.

In this regard, if a jury should have any reasonable doubt from the evidence in the case as to whether the defendant was the victim of an unlawful entrapment, the jury should acquit the accused.

A Voice: Your Honor?

The Court: Yes.

A Voice: Could you please explain at the very beginning, you said readiness and willingness to break the law. Now that pertains only to what the person is being tried for now.

The Court: That's right, that is right.

A Voice: Not any other law at all.

The Court: It has to be only—he is only charged, you know, with bribery.

A Voice: Right.

[233] The Court: Of a federal officer.

A Voice: Right.

The Court: That is what you have to find he was either guilty or not guilty.

You know, you may take a look at somebody and you don't like his looks and you may say, well, he is a crook. But that doesn't enter into this picture.

More confused?

Well, keep in mind the Allen instruction. This says that the case can't be tried any better. Everything that you know about this case has been given to you. And probably you will never have a case that has the facts more clearly set forth because of the transcript.

A Voice: Your Honor, can we consider all the conversation in that transcript?

The Court: Oh, every single word.

A Voice: We are also to consider what was said outside that transcript too on the witness stand.

The Court: Oh, yes, yes.

A Voice: That has to show—

The Court: Not only the words, but also the inferences that can be drawn. People say something that can mean something one way, but it also can be something else another way. And you have to use your common sense to bring it into focus, or into play.

[234] And you have to—you see when the case is over and you arrive at a verdict I am going to have to ask each of you is this verdict yours. And you are going to have to say, yes, truthfully, this is the way I voted and this is the way I believe.

But it doesn't mean, you know, that you should not pay attention to everybody else, say, well, maybe I was wrong the first time, maybe it isn't that way, maybe there isn't reasonable doubt, maybe there is reasonable doubt, you know.

It is a hard case, no question about it, it is a hard case, otherwise it would not have been tried.

A Voice: Your Honor?

The Court: Yes.

A Voice: Could we have the transcript of Mr. Miller's testimony on the stand?

The Court: No.

All right. It is almost lunch time anyway.

Mr. Ten Brink: Your Honor, could the court remain in session after the jury has gone out?

The Court: All right.

(Whereupon the jury withdrew from the courtroom and the following proceedings were had in open court outside the presence and hearing of the jury.)

The Court: All right.

[235] Mr. Ten Brink: Your Honor, at this time I am going to make a motion for a mistrial. It appears to me that the jury has been out—they came back in at 11:16 and they went out at 11:16 yesterday. They have been deliberating at least five and a half hours out of all of that.

The evidence in the case didn't take five hours and their questions indicate that they are hopelessly either confused or locked on the thing, as the note indicates.

At this time I am requesting your Honor to declare a mistrial.

The Court: The motion is denied.

* * * * *

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-266

JOHN J. TATAR, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

I. Petitioner Was Entrapped as a Matter of Law

Contrary to the Government's contention (Opposition, pp. 1-2), the opinion below *does not* set forth the "relevant facts" and there *was not* "ample evidence" from which the jury could find the absence of entrapment. Because the Court of Appeals merely referred to a handful of selected questions and answers, the Petition filed herein (pp. 9-12) attempted to set

forth in some detail what the evidence as a whole reflected, illustrating that as a matter of law petitioner was entrapped. The full scope of relevant evidence cannot be gleaned solely from a reading of the Court of Appeals opinion, an opinion reflecting obeisance to a jury verdict so long as a scintilla of supportive evidence could arguably be found in the record. The Court of Appeals claimed to find an uncorroborated and ambiguous *inference* in the record that petitioner was predisposed to offer a bribe a week before it was offered, and with that placed its imprimatur on the verdict. The Court of Appeals opinion failed utterly to examine whether as a matter of law entrapment was shown based on the record as a whole, and the Government's reliance upon the opinion below as self-supporting, without analysis or discussion, does not controvert petitioner's well documented contention that he was entrapped in a most calculated manner by an internal revenue agent, at the behest and with the assistance of his supervisors. Moreover, the findings and conclusions of the Court of Appeals opinion supporting the jury verdict are pointless because they are premised upon an incorrect standard of entrapment, and because of incorrect assumptions that the jury was properly instructed on entrapment (it was not), that the jury understood the instructions (it did not), and that the jury was not coerced (it was). The rationalizations of the Court of Appeals are even more pointless because the proper legal determination which was required included the question of whether the entrapment issue should have been submitted to the jury at all.

Regardless of whether the proper standard in entrapment cases should focus upon an accused's pre-

disposition or upon the Government's conduct, and regardless of whether or how this Court might decide the other questions presented [independent judicial determination of the entrapment issue, and whether the jury was improperly coerced after becoming deadlocked at the end of a second trial], this Court should find entrapment as a matter of law and reverse this conviction as it did in *Sherman* v. *United States,* 356 U.S. 369 (1958). See Opposition, p. 2 (fn. 1).

II. Improper Jury Instructions, Improper Entrapment Standard

The Government's Opposition does not address the substantial question raised in the Petition for Certiorari, whether the use of the "predisposition" test constitutes an abandonment of the law enunciated by this Court in *Sorrells* v. *United States,* 287 U.S. 435 (1932), and in *Sherman, supra.* While the Government seems to acknowledge that an inquiry into the "creative activity of [law enforcement] officials" is the correct approach in resolving entrapment issues (Opposition, p. 2; quoting from *Sorrells*), the Government fails to recognize or admit that the lower courts herein erroneously abandoned that test in favor of an inquiry into whether petitioner had a "predisposition" to offer a bribe. As a result this Court has been left without an expression of the Government's views on the question raised in the Petition (Question 1) as to which standard is the proper one, and without an expression of the Government's views on the fundamental constitutional problems caused by use of the "predisposition" test.

For example, the "predisposition" test requires the jury to engage in a speculative, subjective, mind-reading inquiry into an accused's "predisposition" to

commit the crime charged without hearing testimony from the accused and observing his demeanor while testifying. In order to counter the catastrophic risk presented, the accused is forced to take the witness stand to dispute the Government's evidence, such as the flimsy inference interjected into this case by the revenue agent's uncorroborated testimony concerning an unrecorded and ambiguous statement by petitioner a week before the alleged bribe offer took place. The compulsion upon petitioner to testify in order to clarify or negate such an inference is directly contrary to an accused's absolute constitutional right not to testify at his trial. A clearer and more direct compulsion upon an accused to testify at his trial in order to overcome the erroneous application of the "predisposition" test cannot be imagined. Because petitioner opted not to testify at his trial, this alleged inference went unassailed, and it was then argued repeatedly to the jury by the prosecutor, his only real argument on predisposition (Tr. 137-139, 142-143, 144, 147, 180, 185-186, 187); it provided an evidentiary predicate for the trial court's erroneous "predisposition" entrapment instruction which was given *three* times after closing arguments; and it provided the Court of Appeals with what it erroneously termed "substantial evidence" supporting the jury verdict.

Only by the application of a test which focuses attention on the objective facts of the creative activity of the Government's agents, the test which we submit is required and which has been mandated by this Court in its 1932 and 1958 opinions dealing with entrapment (*Sorrells* and *Sherman*), can an accused's absolute right not to give testimony at his trial be protected. The Government's failure to dispute the contention that

the wrong standard was used, and the Government's failure to come to grips with the practical and constitutional problems resulting from the use of the wrong standard, requires the conclusion that the Government cannot support the standard which was used here and which is used in the majority of entrapment issues. We submit that the question of which is the appropriate standard in entrapment cases is compelling, that it has constitutional dimensions, that it is determinative in this case, that the use of the incorrect "predisposition" test is a perversion of the real inquiry in entrapment cases (Did the Government go too far?), and that the ends of justice require a plenary consideration of this issue by this Court with the benefit of briefs and argument by petitioner and by the Government.

III. Court Determination of Entrapment Issues as a Matter of Law Under a Procedure Analogous to the Jackson v. Denno Confession Procedure

The Government contends that the petitioner has offered no "persuasive reasons for reexamination" of this Court's unwillingness in 1958 to require a procedure in entrapment cases which was then sought but not adopted until 1964, and then in confession cases. *Jackson* v. *Denno,* 378 U.S. 368 (1964). Without analysis the Government contends that the *Jackson* rule is inappropriate in entrapment cases because of the "different problem of the grave danger of jury prejudice unless the court makes a preliminary finding regarding the voluntariness of a confession." The Government's Opposition does not say it, but the argumentative implication is there—that there is little or no jury prejudice in entrapment cases. This is seriously incorrect. Jury prejudice is even greater in entrapment cases than in confession cases. The typical

entrapment case, such as the instant case, is characterized by an *admission* that the crime was committed and that the accused committed it, compounded by the inherent compulsion upon an accused to testify to dispute inferences of predisposition. What could be more prejudicial? At least in confession cases, where voluntariness is an issue for the jury, the very admission contained in the confession is being contested by the defense, and the inquiry focuses at least in part upon the objective facts of police conduct.

The Government's contention that the decisions in *Sherman, supra,* and *Masciale* v. *United States,* 356 U.S. 386 (1958), "fully considered and rejected" a procedure analogous to that subsequently adopted in *Jackson* is also incorrect. In *Sherman* the conviction was reversed because entrapment was shown as a matter of law, and in reversing that conviction the Court *did not have to reach* the question of whether such a judicial hearing procedure should be required in entrapment cases. *Masciale* is the only case in which a majority of the Court (five justices) actually considered and rejected the suggestion of an independent hearing by the trial court, without a jury, on the question of entrapment; however, in *Masciale* this Court's rejection of this suggestion was not on the merits of the issue itself, but because the Court deemed the question not ripe for decision. Moreover, as in *Sherman,* the question of entrapment as a matter of law was easily decided in *Masciale* where there was not even a "close question" which may have made a more compelling argument for a separate determination by the trial court without a jury.

The only other decision rendered by this Court involving entrapment since 1958 is the 1963 opinion in

Lopez v. *United States,* 373 U.S. 427. *Lopez,* like the instant case, involved bribery of a revenue agent with a tape recording of the conversation. However, in *Lopez* this Court specifically found that the petitioner therein was not contending for a judicial hearing procedure such as was contended for in *Sherman* and *Masciale,* and the Court therefore concluded that "we are not now presented with that question." [373 U.S. 427, 436 (fn. 7)]. *Lopez* was essentially a surveillance case, not an entrapment case. Moreover, contrary to the Government's assertion (Opposition, p. 2), we are not contending that entrapment issues should never be submitted to the jury. We are contending, just as in confession cases, that the trial court should first determine the entrapment issue from the point of view of restraining improper Governmental inducements to crime, with jury consideration thereafter only if the Court does not find entrapment as a matter of law.

Accordingly, the statement in the Government's Opposition is misleading, that this Court has "fully considered and rejected" the proposition that entrapment issues should first be decided by the trial court without a jury, employing a proper standard. That question was not reached in *Sherman* because it was unnecessary to do so; the question was not reached in *Masciale* because the Court felt that the issue was not ripe for decision; and the question was not reached in *Lopez* because the petitioner did not present the issue. And beyond these considerations, this Court could not have *fully* considered and rejected this procedure in 1958 as the Government erroneously contends, because six more years were yet to elapse before this identical proposal was adopted by this Court in any

context (*i.e.*, 1964), and then in the analogous context of determining the voluntariness of confessions. Because of the limiting circumstances prevailing when this issue was first presented to the Court in 1958, when the concept was entirely novel, and because this Court has not since addressed this question in the context of entrapment cases as it did in confession cases in 1964 (*Jackson* v. *Denno*), we submit that a critical oversight affecting substantial justice has developed, an oversight which can now be remedied by full consideration of this question in the context of this case where the application of a proper procedure under a proper test would be determinative. This Court now has the opportunity in light of substantial experience under *Jackson* v. *Denno* to require a proper procedure to be used in entrapment cases; to require a proper standard focusing on the Government's objective conduct rather than on an accused's subjective state of mind; to vindicate a defendant's Fifth Amendment right not to be forced to testify at trial; and to begin the process of accumulating explicit standards and legal precedents by trial and appellate courts as to what constitutes impermissible Government conduct in obtaining convictions, as called for by Justices Frankfurter, Harlan, Douglas and Brennan in their concurrence in *Sherman* and dissent in *Masciale*.

IV. The Trial Court's Coercion of the Jury Was Reversible Error

The Government incorrectly states that the trial court's "Allen" charge was "not at all comparable" to that in *Jenkins* v. *United States*, 380 U.S. 445 (1965), and the Government is also incorrect in its statement that the trial judge in this case "did not indicate that the jury had to reach a decision" (the deter-

minative coercive element in this Court's *per curiam* reversal of the conviction in *Jenkins*).

Consider the comments by the trial court in this case, comments which go beyond the traditional "Allen" charge: "This is the second time this case has been tried. There was a trial a month ago and the jury was hung up. And this is the second time;" and "You should consider that the case at some time must be decided, sometime it has to be decided." The instruction given in this case is virtually identical to the instruction given in the *Jenkins* case, with different wording perhaps, but just as coercive. In *Jenkins* the trial court stated: "You have got to reach a decision in this case." The Government's failure to provide any analysis of how the instruction given in this case was in effect less coercive and therefore less reversible than the instruction given in the *Jenkins* case belies the Government's argument that there is no comparison between the two cases. The comparison is obvious. The Petition filed herein cites several decisions by various courts of appeals in recent years which illustrate the reversible nature of the trial court's admonitions in this case (Petition, p. 17, fn. 7). See especially *United States* v. *Harris,* 391 F. 2d 348, 355 (6th Cir., 1968), where the first trial resulted in a hung jury and mistrial, and at the second trial the court stated: "This lawsuit must be decided—it must be decided at some time by some jury." In such circumstances these comments were held to be reversible error—exactly the same circumstances and comments as in the instant case.

This Court need not reach and review the general application of the "Allen" charge in order to find that the trial court in this case coercively "Allenized"

the jury, requiring a reversal of the conviction. Nevertheless, the whole question of continued use of the traditional "Allen" charge (even without extra comment) should be clarified by this Court. The Government's candid admission of the existence and degree of conflict within the Circuits over this question underlines the compelling need for a definitive resolution. This Court should consider using this case as a vehicle to exercise its general supervisory power over such a wide-ranging and pervasive question of administration of justice in this country. With the increased frequency of appellate court reversals of jury verdicts rendered after coercive Allen charges, usually involving added, extracoercive language as in this case, and with at least three of the eleven Circuits having already exercised supervisory power to stop the use of the traditional Allen charge, the question of a uniform, national policy in the federal courts cannot be and should not be avoided any longer. In 1963 Mr. Justice Clark expressed his view that the "Allen" case was dead law in the following language:

> "Nor do we circulate the "Allen charge" to the new judges as I used to do when heading up the Criminal Division of the Department of Justice. Allen is dead and we do not believe in dead law." *Progress of Project Effective Justice —A Report To The Joint Committee*, 47 J. Am. Jud. Soc'y. 88, 90 (1963).

It is time for this Court to give Allen's ghost perpetual rest.

CONCLUSION

For the reasons stated herein and in the Petition, a Writ of Certiorari should be granted.

Respectfully submitted,

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70-266

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN TATAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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OCTOBER TERM, 1971

No. 70-266

JOHN TATAR, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of corruptly promising to give land to an Internal Revenue Agent with intent to induce the agent to violate his duty, in violation of 18 U.S.C. 201(b). Petitioner was sentenced to 15 years' imprisonment. The court of appeals affirmed, *per curiam* (Pet. App. 1a-6a).

1. Petitioner claims that the entrapment issue was improperly handled by the district court and that the entrapment instructions were inappropriate and misleading. The relevant facts are set forth in the opinion

below (Pet. App. 1a–4a) and make clear that there was ample evidence (see Pet. App. 35a–44a) from which the jury could conclude that the bribe offer was not the "product of the creative activity of [law enforcement] officials", *Sorrells* v. *United States,* 287 U.S. 435, 451, but originated in the mind of petitioner.

Petitioner contends further that the issue of entrapment should be decided, not by the jury, but by the court. This contention has, however, been fully considered and rejected by this Court in *Sherman* v. *United States,* 356 U.S. 369, 376–377; see also *Masciale* v. *United States,* 356 U.S. 386; *Cazares-Ramirez* v. *United States,* 406 F. 2d 228, 230 (C.A. 5), certiorari denied, 397 U.S. 926; *Erwing* v. *United States,* 394 F. 2d 829, 830 (C.A. 9); *Martinez* v. *United States,* 373 F. 2d 810, 812 (C.A. 10).[1]

Petitioner offers no persuasive reasons for reexamination of the *Sherman* rule. *Jackson* v. *Denno,* 378 U.S. 368, on which petitioner relies, involved the different problem of the grave danger of jury prejudice unless the trial court makes a preliminary finding regarding the voluntariness of a confession.

2. After the jurors had deliberated approximately five hours, they sent the judge a note advising that they were at an impasse (Pet. App. 45a). The judge, over defense objection, then gave a charge based on *Allen* v. *United States,* 164 U.S. 492 (Pet. App. 46a–47a). The judge did not indicate that the jury had to reach a decision; he stated that it was "desirable" to do so if it

[1] When entrapment appears as a matter of law, as in *Sherman*, then, of course, the issue should not be submitted to the jury and the indictment should be dismissed by the trial judge.

was "possible", pointing out further that the decision of each juror should be "the result of his or her own convictions, and not a mere acquiescence in the conclusions of other jurors" (Pet. App. 46a). This instruction is not at all comparable to that in *Jenkins* v. *United States,* 380 U.S. 445, 446, where the judge had unequivocally advised the jury that it had to reach a decision. As we have pointed out in a number of recent briefs in opposition, although some federal courts have adopted prospective modifications of the standard *Allen* charge, none has held that the fact that it was given constitutes reversible error. See *United States* v. *Wynn,* 415 F. 2d 135 (C.A. 10), certiorari denied, 397 U.S. 994; *United States* v. *Fioravanti,* 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States,* 396 U.S. 837; *United States* v. *Brown,* 411 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017.[2]

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

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[2] Petitioner also claims the supplemental instructions were improper because the court supplemented the entrapment instructions by stating that there was "lawful" and "unlawful" entrapment. Notwithstanding this allegedly confusing terminology, the essence of the instruction properly stated the governing law (see Pet. App. 49a).

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Rule 24(5) of the Rules of this Court, petitioner submits this Supplemental Brief in order to call the Court's attention to a landmark recent decision which bears directly on the issues raised in the Petition for a Writ of Certiorari. On September 14, 1971, the United States Court of Appeals for the District of Columbia Circuit, *En Banc,* rendered a decision in *United States* v. *Thomas* (No. 22,768) forbidding con-

tinued use by federal courts in the District of Columbia of the standard *Allen* instruction. The *Thomas* decision is especially significant (1) because it widened the split among the federal circuit courts on the question of whether the traditional *Allen* charge should be used by trial courts, (2) because the Court of Appeals also found that the admonitions given by the trial court were sufficiently coercive to require a reversal of the conviction therein on that ground alone, and (3) because the opinion notes an implied admission by the Government that its traditionally strong and unbending argument in favor of the standard *Allen* charge is being severely eroded by the trend of decisions on this issue.

In *Thomas* the *En Banc* Court of Appeals joined the Courts of Appeals for the Third, Seventh and Tenth Circuits, and the highest courts in several states, in prohibiting the further use of the standard *Allen* charge.[1] The *Thomas* decision not only broadens the conflict among the circuits, but the opinion is also an articulate expression of the need for intervention by appellate courts into the manner in which trial courts handle deadlocked juries. Such intervention is essential to sound administration of justice and to stem the tide of difficult appellate litigation made necessary by the continued use of the traditional *Allen* instruction, and by

[1] The decisions of the United States Courts of Appeals for the Third, Seventh and Tenth Circuits, and the highest courts in the states of Arizona, Montana and Pennsylvania have already been noted and discussed in the Petition, the Government's Opposition, and in petitioner's Reply. In addition, on August 6, 1971, the Supreme Court of Alaska reached a similar decision in *Fields* v. *State*, 9 Crim. L. Rptr. 2473, adding to the number of state courts which have repudiated the use of the standard *Allen* instruction.

the use of "*Allen*-plus" language which trial courts seem unable to avoid.

While four of the eleven circuits have now prohibited continued use of the standard *Allen* charge, it is also apparent that the remaining circuits have continued to follow this Court's seventy-five year old opinion in *Allen* v. *United States,* 164 U.S. 492 (1896), because of the view that any change should come from the Supreme Court rather than from the Courts of Appeals. See, for example, *Hodges* v. *United States,* 408 F.2d 543, 552 (8th Cir. 1969; opinion by Blackmun, Circuit Judge).

In our Petition for a Writ of Certiorari, and in our Reply to the Government's Memorandum in Opposition, both of which were filed before the *Thomas* decision, we noted the split among the circuits on this question, and requested this Court to review this most important matter in the context of this case from the Ninth Circuit. We did so not only because of the need for an exercise by this Court of its general supervisory powers, but also because this case presents a well-developed trial record showing reversibly coercive instructions which went beyond the traditional language of the *Allen* charge. While we are urging this Court to reverse petitioner's conviction because of the compellingly coercive "*Allen*-plus" admonitions on the authority of *Jenkins* v. *United States,* 380 U.S. 445 (1965), and other cases (now including *Thomas*), we are also urging a general supervisory review of this issue by this Court.

The Government will either seek review by this Court of the *Thomas* decision or acquiesce in it. In either event, the position taken by the Government in its

Opposition to the Petition for Certiorari in this case has changed. If the Government should decide to seek review by this Court of the *Thomas* decision, it would be reversing its position in this case—that this issue is not one which the Court should review. Also, if review is sought in *Thomas* and granted, it would be unfair to this petitioner to have his request for review denied only to have the issue decided later in the context of the *Thomas* decision but, because of the timing, affording petitioner no relief.

On the other hand, if the Government does not seek review of the *Thomas* decision, its acquiescence in that decision would constitute a change of position from that expressed in the Government's Opposition herein. In that event, justice would seem to require the same concession to this petitioner that the Government would be making to the appellant in *Thomas*.

It is now unknown whether the Government will seek review by this Court of the *Thomas* decision. However, it should be noted that the Government deemed the issue important enough to request *En Banc* rehearing by the Court of Appeals, and that in arguing the *Thomas* decision the Government evidenced a change in its traditional position of unbending support for the standard *Allen* charge. As described in the *Thomas* decision:

> "At oral argument the Government, anticipating that we might modify our rule, proposed that we not adopt the ABA-approved instruction but instead accept variant wording (footnote omitted). Our initial reaction is that the wording proposed is not a major improvement. Perhaps further study would confirm that initial view. But we are not disposed to open the door to variants in

> language, having in mind that it was through just such a process that the courts were led into the increasing difficulties we outlined earlier in this opinion." Slip Opinion, pp. 21-22.

Although it is not fair to say that the Government made a major concession, the position taken by the Government in oral argument before the Court in *Thomas* is an indication that federal prosecutors are reluctantly acknowledging that the tide is against them on this issue.

Prior to the *Thomas* decision the leading decision in the District of Columbia was *Fulwood* v. *United States*, 125 U.S. App. D.C. 183, 369 F.2d 960 (1966), *cert. denied* 387 U.S. 934 (1967). In his opinion in *Fulwood*, Judge (now Chief Justice) Burger urged the trial bench to "consistently use a form of instruction plainly within *Allen*." However, the *Thomas* court found that trial courts have not done so; they have continued to use expressions which add extra measures of influence upon juries. After finding that the *Fulwood* admonition to trial courts had not engendered the desired result, the *Thomas* court then stated:

> "We believe that appellate courts should no longer be burdened with the necessities and niceties—and the concomitant uncertainties—of gauging various *Allen*-type renditions in terms of the coerciveness of their impact. We are persuaded, too, by the volume and complexity of litigation generated by the *Allen* charge, that its continued unrestricted use is incompatible with sound judicial administration. We have before us today what was not available when *Fulwood* issued—the standard that was painstakeningly reviewed and approved by the designated committee of the American Bar Association's Project on Minimum Standards for

> Criminal Justice, that was adopted by its House of Delegates, and that was mandated by opinions of the Third and Seventh Circuits. We think the time has come to follow the path they have traveled and lay down the same mandate." Slip Opinion, pp. 17-18.

We urge this Court similarily to lay down the same mandate, and to adopt the American Bar Association's proposal.

The *Thomas* decision is significant not only because it joined three other circuits in prospectively prohibiting the use of the traditional *Allen* charge, but also because the Court of Appeals for the District of Columbia Circuit prefaced that ruling with a finding that the instructions utilized by the trial court were sufficiently coercive to require a reversal on that ground alone. That finding and conclusion is directly relevant to the instant case because the coercion found in the *Thomas* case was even less compelling than the coercion applied against petitioner's jury. The *Thomas* decision found several coercive elements which, in combination, required a reversal (Slip Opinion, pp. 9-13), each of which is present in the instant case; however, of even greater importance is the fact that the *Allen* instruction was given in the main body of instructions to the *Thomas* jury, before deliberations and deadlock. The dissenting opinion in *Thomas* notes that the instruction in those circumstances is inherently less coercive (when given prior to deliberations), and more coercive when used after a jury deadlocks. In the instant case petitioner's jury was "Allenized" after they reached an impasse.

In finding coerciveness requiring a reversal in the *Thomas* case, the Court of Appeals for the District of

Columbia Circuit cited (Slip Opinion, p. 10) and relied upon this Court's decision in *Jenkins* v. *United States*, 380 U.S. 445 (1965), which has been cited and relied upon as controlling precedent by petitioner herein. Accordingly, the *Thomas* decision adds further support to our contention that petitioner's conviction should and can be reversed upon established precedent on the basis of jury coercion, even without reaching the question of whether this Court in the exercise of its general supervisory powers should review this issue and resolve the conflict among federal and state appellate courts.

CONCLUSION

Therefore, for the reasons stated herein, and in the Petition and in the Reply previously filed, a Writ of Certiorari should be granted.

Respectfully submitted,

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